TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 656

UNITED STATES OF AMERICA ET AL., APPELLANTS

vs.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP DOING BUSINESS AS ADAMS, CORRICK & KELEHER ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

FILED DECEMBER 23, 1935

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1 [Caption omitted.]

3 In United States District Court for the Northern District of Illinois, Eastern Division

In Equity No. 14900

J. M. Corrick and L. J. Keleher, a Partnership, Doing Business as Adams, Corrick, and Keleher; A. E. Adler, Doing Business as Adler, Sons & Co.; Alexander Conover & Company, Inc., a Corporation; Louis Armbrecht, Doing Business as Louis Armbrecht Commission Co.; A. C. Baker, A. C. Baker, Jr.; E. H. Baker, F. L. Heyne, H. B. Heyne, a Partnership, Doing Business as Baker, Heyne & Co., T. J. Barton, T. P. Looney, and R. F. Kennedy, a Partnership, Doing Business as Barton, Looney & Kennedy; G. A. Benton, Doing Business as Benton & Co., L. S. Com.; Bowler Live Stock Com. Co.; a Corporation; W. H. Brott, Doing Business as Brott Live Stock Com. Co.; Clarence M. Brown; Geo. M. Brownson, Doing Business as Geo. M. Browson & Co.; C. L. Burnett, Doing Business as Abe Burnett & Co.; M. J. Callahan, Doing Business as Callahan Live Stock Commission Company; Harry L. Carpenter; Central Live Stock Commission Company, a Corporation; K. A. Clark, Doing Business as Clark, Bowles & Co.; Frank Connor, Alan F. Wilson, Chas. Smith and M. B. Morgan, a Partnership, Doing Business as John Clay and Company; N. W. Cochran, A. M. Henneberry, and R. W. Wallace, a Partnership, Doing Business as Cochran, Henneberry, and Wallace; Conklin Bros. Com. Co., a Corporation; H. D. Copeland & Co., a Corporation; Wm. Daniel; P. T. Dolan and Hokan Roll, Partnership, Doing Business as Dolan, Ludeman & Co.; P. T. Dolan and T. J. Sinnard, a Partnership,
4 Doing Business as Dolan, Sinnard and Co.; E. A. Woods and P. E. Moore, a Partnership, Doing Business as Drovers Commission Co.; H. C. Dunbar, Doing Business as Dunbar, St. John & Company; E. H. Egan, Doing Business as E. Egan & Company; J. L. Ettlinger, Doing Business as Ettlinger L. S. Com. Co.; Evans, Snider, Buel Com. Co., a Corporation; Max Farley; E. J. Feldes, Doing Business as Feldes Commission Company; Filler, Wilson & McClelland, A Corporation; Wm. Gentleman, W. M. Gentleman, A. M. Gentleman, G. J. Gentleman, and C. F. Gentleman, a Partnership, Doing Business as J. A. Frazier & Sons; Fred Freeman; I. O. Fry; Wm. Gentleman, W. M. Gentleman, A. M. Gentleman, G. J. Gentleman, C. F. Gentleman, Doing Business as Wm. Gentleman & Sons; E. J. Gibbons, Doing Business as E. J. Gibbons and Company; R. E. Gillogly, S. G. Gillogly, F. D. Gillogly, M. W. Gillogly, a Partnership, Doing Business as Gillogly & Co.; G. J. Greenwood, Doing Business as Greenwood Commis-

SION CO.; C. A. HAFNER, DOING BUSINESS AS HAFNER, NIXON CO.; G. J. RENEKER, DOING BUSINESS AS HAIME & RENEKER; F. J. HALPIN AND D. G. HAYES, A PARTNERSHIP, DOING BUSINESS AS HALPIN L. S. COM. CO.; CHAS. E. HARDING CO., A CORPORATION; C. W. HART, DOING BUSINESS AS C. W. HART COM. CO.; J. B. HATCH, JR., DOING BUSINESS AS J. B. HATCH AND CO.; LESTER W. HATCH, DOING BUSINESS AS LESTER W. HATCH & CO.; FRED H. HATCH, FRED HATCH AND HOWARD HATCH, A PARTNERSHIP, DOING BUSINESS AS HATCH L. S. COM. CO.; HEFNER COMMISSION CO., A CORPORATION; E. HOLLOWAY, A. E. HOLBERT, P. A. OGREN, E. J. ANDREWS, A PARTNERSHIP, DOING BUSINESS AS HOLLOWAY & OGREN; GEORGE W. HULL; ART E. HUMBERT, DOING BUSINESS AS ART HUMBERT COMMISSION; INGWERSEN, MOSIER & INGWERSEN, INC., A CORPORATION; IOWA LIVE STOCK COM. CO., A CORPORATION; W. O. JENNINGS; R. E. JOHNSON, DOING BUSINESS AS JOHNSON COMMISSION COMPANY; FRANK KEYS, INC., A CORPORATION; L. A. KEYS, DOING BUSINESS AS LYMAN KEYS COMMISSION CO.; D. J. KIRLEY AND P. KIRLEY, DOING BUSINESS AS KIRLEY BROS. L. S. COM. CO., A PARTNERSHIP; C. A. KLEMAN; E. KNETTLE, DOING BUSINESS AS KNETTLE BROS.; E. H. KUENSTER, DOING BUSINESS AS KUENSTER LIVE STOCK COMM.; A. J. LABARTHE; LAWLER BROS. & CO., A CORPORATION; G. E. MARTIN, W. A. HANLEY, W. S. BURMISTER, A PARTNERSHIP, DOING BUSINESS AS MARTIN BROS. & CO.; MCCAUSLAND, HOAG & VAUGHN, A CORPORATION; J. L. MERRION AND J. R. WILKINS, A PARTNERSHIP, DOING BUSINESS AS MERRION & WILKINS; MILLER, WHITE & WOODS, A CORPORATION; G. HIXON, DOING BUSINESS AS MINTEER, HUBBIRD & CO.; C. H. MOBERLY; H. J. MOON, P. B. UNTHANK, A PARTNERSHIP, DOING BUSINESS AS MOON AND UNTHANK; M. E. BARNES, DOING BUSINESS AS MULLEN COMMISSION COMPANY; A. R. JENKINS, DOING BUSINESS AS MURRAY & MCDOWELL; IRVINE H. MURRAY; MUTUAL LIVE STOCK COM. CO., A CORPORATION; W. J. NALLY, DOING BUSINESS AS NALLY L. S. COM. CO.; JOSEPH F. NASH; NATIONAL LIVE STOCK COM. CO., A CORPORATION; C. E. NIXON; C. E. NIXON & CO., INC., A CORPORATION; H. L. DUNNING AND WM. NORRIS, A PARTNERSHIP, DOING BUSINESS AS NORRIS AND DUNNING; NORTHWESTERN LIVE STOCK COM. CO., A CORPORATION; W. H. PALMER, DOING BUSINESS AS SILAS PALMER & SONS; W. C. PATTERSON, DOING BUSINESS AS JOHN PATTERSON & SON; G. C. PETERS, DOING BUSINESS AS G. C. PETERS & COMPANY; W. A. PETERSON AND WM. TURNBULL, A PARTNERSHIP DOING BUSINESS AS PETERSON, TURNBULL & COMPANY; T. K. POLLEY, DOING BUSINESS AS T. K. POLLEY & CO.; J. E. QUINN, DOING BUSINESS AS QUINN COMMISSION COMPANY; CHAS. R. RICE, DOING BUSINESS AS RICE BROS.; A. E. RINDERLE, DOING BUSINESS AS ALEX RINDERLE CO.; W. P. ROACH, DOING BUSINESS AS ROACH L. S. COM. CO.; W. A. ROBERTS AND W. D. MILLS, A PARTNERSHIP, DOING BUSINESS AS ROBERTS AND MILLS COMPANY; C. L. ROBINSON, DOING BUSINESS AS CHARLES O. ROBINSON COMPANY; ROSENBAUM BROS. & CO., A CORPORATION; J. A. SARSFIELD,

J. P. SARSFIELD, G. A. SCHROCK AND WALTER KUENSTER, A PARTNERSHIP, DOING BUSINESS AS SARSFIELD, SCHROCK AND KUENSTER; A. P. SCHMAL; H. SCHROEDER AND A. C. SCHROEDER, A PARTNERSHIP, DOING BUSINESS AS SCHROEDER L. S. COM. CO.; C. H. SCHULTZ, DOING BUSINESS AS SCHULTZ L. S. COMM. COMPANY; F. W. SHELDON, DOING BUSINESS AS SHELDON COMM. CO.; W. H. SHERWOOD AND R. H. SHERWOOD, A PARTNERSHIP, DOING BUSINESS AS SHERWOOD & SON; JOHN SMITH AND J. C. EASTES, A PARTNERSHIP DOING BUSINESS AS WM. R. SMITH & SON; L. SPENCER, DOING BUSINESS AS L. SPENCER & COMPANY; S. B. STAFFORD, DOING BUSINESS AS STAFFORD BROS.; STANDARD LIVE STOCK COMMISSION COMPANY, A CORPORATION; A. F. STARRETT, JR. AND M. E. PESCHONG, A PARTNERSHIP, DOING BUSINESS AS STARRETT L. S. COMM. CO.; R. E. COMPTON AND W. L. COMPTON, A PARTNERSHIP DOING BUSINESS AS ST. JOHN COMPTON DUNBAR CO.; STOCKMEN'S L. S. COM. CO.; A CORPORATION; J. A. STRACHAN, DOING BUSINESS AS J. A. STRACHAN & CO.; A GILMORE, C. J. CASTENHOLZ; E. V. PARRISH, H. B. DUPLAN, JR., A PARTNERSHIP, DOING BUSINESS AS SWANSON, GILMORE & CASTENHOLTZ; C. M. SWINEY, T. E. SWINEY AND W. B. SWINEY, A PARTNERSHIP, DOING BUSINESS AS SWINEY BROTHERS; H. O. THOMPSON, DOING BUSINESS AS H. O. THOMPSON & CO.; GEO. W. VON BERNER;
6 DAVID C. WAGNER; H. C. WALTER AND R. A. WALTER, A PARTNERSHIP, DOING BUSINESS AS WALTER BROTHERS; C. A. WALTERS, J. H. WALTERS, AND J. T. WALTERS, A PARTNERSHIP, DOING BUSINESS AS WALTERS & DUNBAR; G. L. WHEELER, DOING BUSINESS AS GUY L. WHEELER & CO.; E. F. WOELFER, DOING BUSINESS AS E. F. WOELFER & CO.; F. E. BURT, DOING BUSINESS AS WOOD BROTHERS; G. K. WOOD, DOING BUSINESS AS GLEN K. WOOD & COMPANY; W. C. WOOD, DOING BUSINESS AS WILL C. WOOD & COMPANY; W. E. YOUNG, DOING BUSINESS AS W. E. YOUNG & CO.; PETITIONERS AND PLAINTIFFS

vs.

UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA, AND MICHAEL IGOE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, RESPONDENTS AND DEFENDANTS

7 *Petition and complaint*

Filed Oct. 31, 1935

To the honorable the Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

1. Petitioners and plaintiffs are individuals, partnerships, or corporations, as appears from their several names, all registered with the Secretary of Agriculture (hereinafter referred to as Secretary

or the Secretary) under the Packers and Stockyards Act, 1921 (Title 7, Chap. 9, U. S. Code), and doing business as market agencies engaged in the buying and selling of live stock on a commission basis at the Union Stock Yards, Chicago, Illinois, which yards has been ascertained by the Secretary to be a "stockyard" as defined in said Act and which has been posted as such.

2. Each of the petitioners has his or its principal office or principal operating office in the judicial district and division wherein this suit is brought; and the subject matter about which the petitioners and plaintiffs complain arose in the division and district wherein this suit is brought.

3. The United States of America; Henry A. Wallace, Secretary of Agriculture; Homer S. Cummings, Attorney General; and Michael Igoe, United States District Attorney for the Northern District of Illinois, are made respondents and defendants in this action pursuant to the provisions of said Packers and Stockyards Act, 1921; the Commerce Court Act (36 Stat. at L. 539, approved June 18, 1910); and the District Court Jurisdictional Act, a part of
8 the Deficiencies Appropriation Act (38 Stat. at L. 208, 219, 221), approved October 22, 1913, and amendments thereof. The jurisdiction of this Court arises from said statutes and laws; and also because this is a suit of a civil nature wherein the matter in controversy exceeds the sum or value of Three Thousand Dollars ($3,000) exclusive of interest and costs, and arises under the constitution or laws of the United States, the correct decision of this suit depending, in whole or in part, upon the construction and application of the Constitution of the United States, particularly the Fifth Amendment thereof.

4. The petitioners and plaintiffs bring this action in equity against the defendants for the purpose of enjoining and restraining the defendants, and each of them, from interfering civilly by suspension of the registration of the petitioners or by the exaction of penalties or forfeitures, or criminally by prosecution, with the publication, demands for, and collection of rates and charges lawfully established by the plaintiffs and petitioners in a schedule or tariff effective November 1, 1935.

5. After the enactment of the Packers and Stockyards Act, 1921, Chicago Union Stock yards was posted by the then Secretary of Agriculture under the provisions of said Act as a stockyard within the terms and provisions of said Act. Also, subsequent to the enactment of said Packers and Stockyards Act, 1921, the Chicago Live Stock Exchange (a trade association whose members comprise commission merchants and other market agencies), and all market agencies, members thereof, including some or all of the petitioners, agreed with the then Secretary of Agriculture that in lieu of
9 the formal procedure and hearing provided for by the Packers and Stockyards Act, 1921, that rates, charges, and practices found to be just and reasonable by certain arbitrators and recommended by them, would be adopted by the Chicago Live Stock

Exchange and the members thereof upon approval by the Secretary of Agriculture. Pursuant to said arbitration, and after lengthy investigation and hearing, a schedule of rates, charges, and practices was prescribed and found by said arbitrators, approved by the then Secretary of Agriculture, and adopted by the Chicago Live Stock Exchange and the members thereof. The tariff or schedule so recommended, prescribed, and adopted has remained in effect, without substantial alteration, save as hereinafter set forth, since September 1923; and the petitioners and plaintiffs and others similarly situated have, since that date, adopted, followed, and used the said schedule.

6. On September 23, 1932, the then Acting Secretary of Agriculture entered an order of inquiry and notice of hearing against the market agencies at Chicago Union Stock Yards, wherein it was directed that an inquiry be made for the purpose of determining the lawfulness of any and all rates and charges of the petitioners. Pursuant to said Order and Notice, a hearing was had before an examiner purporting to act under and by the authority of the Secretary; and oral argument was had on December 13, 1933, before the Secretary.

7. On the 8th day of January 1934 the Secretary executed and issued his Proceedings, Findings of Fact, Conclusion, and Order. By said Order of January 8, 1934, a schedule of purported reasonable rates, charges, and classifications was prescribed effective thirty (30) days thereafter. After the denial of a petition for rehearing, the schedule of rates and charges of the Order of January 8, 1934, was slightly modified by an Order entered March 12, 1934, the schedule of rates, charges, and practices of said Order to be effective on and after April 20, 1934. On April 9, 1934, the petitioners and others filed an amended petition for rehearing which was denied by the Secretary on April 12, 1934.

8. On April 18, 1934, there was filed in this Court by some of the petitioners herein and others, a petition and complaint entitled "C. H. Acker, doing business as C. H. Acker & Company et al., vs. United States of America et al., Equity No. 13829", seeking to enjoin and restrain the enforcement by the defendants therein of the Order of January 8, 1934, and the Supplemental Order of March 12, 1934. Upon motion for preliminary injunction, this Court, on the 19th day of April, 1934, issued an interlocutory writ of injunction against the defendants upon the condition that the plaintiffs and petitioners impound with the Clerk of this Court the difference between the charges collected under the schedule of rates then in effect and the amount which would have been collected under the rates prescribed in the Order and Supplemental Order of the Secretary of Agriculture. Upon final hearing this Court entered a decree on March 19, 1935, dismissing the complaint and providing further that if an appeal should be taken to the United States Supreme Court within thirty (30) days, the interlocutory injunction theretofore granted, including the provisions in respect to the

impounding of funds, should continue in effect during the pendency of said appeal and until final disposition. Such appeal was prayed and allowed and a supersedeas granted continuing the interlocutory injunction in force upon the same conditions with respect to the impounding of excess charges. Said appeal is pending and undetermined.

11 9. The defendants in said cause No. 13,829 in equity in this Court, have faithfully and completely complied with the injunctional order and writ of this Court; and the petitioners and plaintiffs in said cause, who in the main are the petitioners and plaintiffs in this cause, have faithfully and fully complied with the orders of this Court with respect to the impounding of excess charges. There is now impounded with the Clerk of this Court the sum of Seven Hundred Forty-eight Thousand Nine Hundred Eighty-seven and 23/100 Dollars ($748,987.23).

10. The schedule of rates and charges prescribed by the Secretary's Order and Supplemental Order were the result of an investigation of the costs, volume of business, and receipts, for the years 1931 and 1932. Subsequent to those years, subsequent to the Order and Supplemental Order of the Secretary, and subsequent to the hearing and the decree of this Court, the receipts of live stock at the Chicago Union Stock Yards have decreased in volume until, for example, the receipts of live stock during August 1935, were the lowest of any August since the year 1882. Changed economic conditions, decreased volume of live stock, and decreased volume of receipts have created such hardship and caused such losses among the petitioners and plaintiffs that, acting pursuant to law, the petitioners and plaintiffs have filed and published a new schedule of rates effective November 1, 1935.

This the plaintiffs and petitioners were compelled to do in self-preservation for (1) as hereinafter alleged, the Secretary refused to act in the premises because litigation was pending to test the validity of the Secretary's Order and Supplemental Order in Bureau of Animal Industry Docket 402.

12 11. On September 18, 1935, attorneys representing the petitioners and plaintiffs brought to the attention of the Secretary, by personal conference with John R. Mohler, Chief of the Bureau of Animal Industry in the Department of Agriculture, the conditions in the Live Stock Commission business at the Chicago Union Stock Yards, arising from the decreased volume of receipts and other causes. The result of the conference is reflected in a letter of September 23, 1935 to the Secretary, which letter is in words and figures as follows:

SEPTEMBER 23, 1935.

Honorable HENRY A. WALLACE,
Secretary of Agriculture,
Washington, D. C.

DEAR SIR: On September 18th, Mr. John S. Boyd, who is attorney for market agencies at the Union Stock Yards in Chicago, and the

writer, representing Chicago Live Stock Commission men, called upon Dr. J. R. Mohler, Chief, Bureau of Animal Industry, in Washington. Our object was to bring again to his attention and to the notice of the Department of Agriculture, present conditions in the Live Stock Commission business in Chicago, its difficulties, and perhaps its inability to proceed with the now very much decreased volume of receipts. For example, the receipts of live stock during August 1935, were the lowest of any August since 1882 as we are informed. Because of this condition, we wished to discuss some practical arrangement agreeable to the Secretary of Agriculture for procuring an increase in rates for the immediate future.

Dr. Mohler advised us of his and the Department's familiarity with the condition of the Commission men and their business, and of his sympathetic attitude, but said nothing could be done because of the opinions of the Solicitor of the Department of Agriculture and of the Attorney General to the effect that as a legal matter, the Secretary could do nothing while litigation is still on. The litigation referred to is that of "Secretary of Agriculture v. C. H. Acker, doing business as C. H. Acker & Company et al.," now pending on appeal to the Supreme Court of the United States. Since the only impediment to action in the premises was the legal one indicated by Dr. Mohler we told him that we would endeavor to obtain an unleashing of it, and, to this end, and at his suggestion, we called
13 upon the Solicitor of the Department of Agriculture. He advised us to consult the Attorney General's office through calling upon Mr. John Dickinson.

We left with the Solicitor of the Department of Agriculture a "Memorandum on Right of Secretary to Establish a Tariff of Increased Rates Pending Litigation to Restrain the Enforcement of the Secretary's Orders dated January 8, 1934, and March 12, 1934", and then called upon Mr. Dickinson. Upon a mere statement of the proposition he advised us there could be no question about the Secretary's right to establish rates for the future, notwithstanding the litigation, as the statute in the matter was entirely clear. We reported this back to the Solicitor of the Department of Agriculture. He later told us that he had conferred with Dr. Mohler, with the result that Dr. Mohler advised that notwithstanding there was no legal impediment, that as a matter of policy the Department would not consider any increase of rates while the litigation is pending.

On the next forenoon, September 19th, we called at your office and there saw Mr. Milo Perkins, your administrative assistant. He felt that under the circumstances we should bring this subject directly to your attention. He advised that your day was extremely full and that you expected to leave town that evening. Under the circumstances it was thought best to send this letter, which Mr. Perkins kindly volunteered to bring before you. Regardless of opinions upon existing conditions under which the Live Stock Com-

mission men at Chicago were endeavoring to serve at the time of, and prior to, the entry of the Orders of January and March 1934, those conditions are much worse now. Some action must be taken. Perhaps the most convenient method for proceeding is for the Commission men to now file a new tariff, the consideration of which may be had in regular course.

We feel the situation is one which will appeal to you and we would like your attention to whatever you consider it proper and just to give it.

Yours very truly,

(Signed) GEO. I. HAIGHT.

GIH:FS

The response of the Department of Agriculture to the foregoing letter is in words and figures as follows:

14 DEPARTMENT OF AGRICULTURE,
Washington, September 30, 1935.

MR. GEORGE I. HAIGHT,
209 South La Salle Street,
Chicago, Illinois.

DEAR MR. HAIGHT: This will acknowledge receipt of your letter dated September 23, 1935, with which you enclosed a letter of the same date addressed to the Secretary respecting interviews you had with various Officials of this Department and of the Department of Justice in connection with the order of the Secretary in B. A. I. Docket No. 402, in which you urge that some action be taken, perhaps by the filing of a new tariff by the commission men for the consideration of the Department.

The statements in your letter and the suggestion you make have been carefully noted and considered. It is our view that the commission rate situation at the Chicago market should not be disturbed pending the determination of the suit brought by the market agencies to test the validity of the Secretary's order prescribing reasonable rates and charges for their services at that market.

Sincerely yours,

(Signed) MILO PERKINS,
Assistant to Secretary.

12. The Packers and Stockyards Act, 1921, provides for the filing and publication, under the provisions of the statute and under lawful regulations of the Secretary, by market agencies at any stockyards under the Act, of new schedules of rates and charges or amendments to old schedules, the Act requiring ten days' notice to the Secretary and to the public by filing with the Secretary and publishing in the manner provided such new schedule or amended schedule. Upon the filing and publication of such new schedule or such amended schedule, the Secretary is empowered by the Act to enter
15 upon a hearing concerning the lawfulness of such rates and

charges and pending such hearing to suspend the proposed schedule or proposed amended schedule for a limited period of time pending such hearing and a determination by the Secretary. If a schedule filed and published in accordance with the statute is not suspended in accordance with the Act, it becomes effective, by the terms of the Act, upon the effective date provided in such schedule; and thereafter the market agency or agencies who filed and published said schedule are forbidden by the Act to charge, demand, or collect a greater or less or different compensation for their services than the rates and charges specified in the schedule so filed. Whoever fails to comply with Packers and Stockyards Act, 1921, in this respect is liable to a penalty of not more than Five Hundred Dollars ($500) for each offense and whoever wilfully fails to comply is liable upon conviction to a fine of not more than One Thousand Dollars ($1,000) or imprisonment of not more than one year, or both.

13. The plaintiffs and petitioners being unable to obtain relief and increased rates from the Secretary of Agriculture as alleged in Paragraph 11 hereinabove, duly prepared, published, and submitted to the Secretary for filing, a schedule or tariff of rates superseding all previous tariffs and amendments thereto, said schedule bearing publication date October 19, 1935; and the effective date of November 1, 1935. Such schedule was prepared, published, and submitted for filing in full and complete compliance with all provisions of Packers and Stockyards Act, 1921, and the General Rules and Regulations of the Secretary of Agriculture. A photostatic copy of such schedule is attached hereto marked Exhibit A.

16 All rates and charges provided in said tariff or schedule, Exhibit A, are just, reasonable, and non-discriminatory.

14. Said schedule was received for filing by the Department of Agriculture on October 19, 1935, as appears from the stamp of the Bureau of Animal Industry of the Department of Agriculture appearing upon Exhibit A. The Secretary of Agriculture unlawfully, arbitrarily, capriciously and without justification, refused to retain the proposed new schedule of rates and charges upon the grounds—

(1) "that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding"; and

(2) "The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders (in Bureau of Animal Industry Docket 402)."

The Secretary thereupon returned the schedule submitted for filing to the plaintiffs and petitioners in a letter dated October 26, 1935, which is in words and figures, as follows:

DEPARTMENT OF AGRICULTURE,
Washington, October 26, 1935.

Mr. E. M. HUGHES,
Secretary The Chicago Live Stock Exchange,
Union Stock Yards, Chicago, Illinois.

DEAR MR. HUGHES: Receipt is acknowledged of your letters of October 17, to me and to Doctor Mohler, with which you transmitted on behalf of commission firms at the Chicago market, members of the Chicago Live Stock Exchange, copies of a schedule of rates for buying and selling livestock on a commission basis, to become
17 effective November 1, 1935.

It is noted that this schedule sets out rates and charges other than those set forth in the orders issued by the Secretary of Agriculture on January 8, 1934, and March 12, 1934, in B. A. I. Docket No. 402, prescribing rates and charges for stockyard services on the Chicago Stock Yards. Those orders were based upon careful consideration of the evidence adduced at an exhaustive hearing. The order of March 12 was made after consideration of a petition for rehearing filed by the market agencies on February 7, 1934, and substantially increased the rates prescribed in the order of January 8. An amended petition for rehearing was denied April 9, 1934. In accordance with the provisions of the Packers and Stockyards Act, 1921, the orders specifically directed that no "market agency shall publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service." Severe penalties for violations of such orders are imposed by the act. The Secretary will insist upon compliance with his orders.

The Department administratively construes the Packers and Stockyards Act, 1921, to mean that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding. The mere proffer to file a new schedule of different rates and charges does not require the Secretary to receive and file such schedule.

The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders. The market agencies sought to enjoin the enforcement of those orders by suit filed in a Federal District Court of three judges. The court, on December 31, 1934, sustained the orders. The market agencies have taken steps to appeal the case to the Supreme Court of the United States. It is not deemed wise to receive and file the proposed new schedule of rates and charges which are in conflict with those found by the court to be fair to the market agencies.

Your attention is invited to the fact that the schedule submitted does not comply with the provisions of Regulation 3(a) of the

rules and regulations under the Packers and Stockyards Act in that it is not properly numbered.

The schedule submitted with your letter is herewith returned.

Very truly yours,

(Signed) H. A. WALLACE,
Secretary.

Enclosure:

Schedule (Original and 2 copies).

18 15. The petitioners and plaintiffs allege that having made full compliance with the provisions of Packers and Stockyards Act, 1921, and with the General Rules and Regulations of the Secretary of Agriculture thereunder, in the publication and submission for filing of a schedule of just, reasonable, and non-discriminatory rates and charges, the refusal of the Secretary to retain such schedule is void and of no effect and that such schedule is properly filed; and that the duties of the plaintiff market agencies in respect to the filing of said schedule were performed upon the delivery of such schedule to the Secretary to be kept upon file and that the arbitrary and unreasonable failure of the Secretary to perform his duty in the retaining of such schedule is a nugatory act.

16. The petitioners and plaintiffs allege that it was the duty of the Secretary, upon the submission of said schedule for filing, if he believed the rates and charges therein contained to be unjust, unreasonable or discriminatory, to at once suspend such schedule, as provided by the Act, in order that a hearing and determination might be made whether such rates and charges were just, reasonable, and non-discriminatory. The failure and refusal of the Secretary to follow the law in this regard and instead to take the actions and make the threats aforesaid was unlawful, arbitrary, capricious and without justification.

19 17. By reason of the filing and publication in full compliance with the law and with the regulations of the Secretary of Agriculture of the schedule of rates and charges contained in Exhibit A, such schedule and tariff by operation of law is now established to become effective on November 1, 1935, and the petitioners and plaintiffs are compelled, under the provisions of Packers and Stockyards Act, 1921, to put such schedule of rates and charges into effect and in the event of their failure to do so, are made liable to severe civil penalties or forfeitures and severe fine or imprisonment, namely: a penalty of not more than Five Hundred Dollars ($500) for each offense and not more than Twenty-five Dollars ($25) for each day it continues to accrue to the United States and which may be recovered in a civil action brought by the United States; and a fine of not more than One Thousand Dollars ($1,000) or imprisonment for not more than one year, or both, upon conviction for wilful failure to comply with the provisions of the Act.

18. On the other hand, the Secretary threatens to prosecute the plaintiffs and petitioners and to recover from them forfeitures to the United States in the sum of Five Hundred Dollars ($500) for each

offense, each day constituting a separate offense, for failure to obey the Orders of the Secretary of January 8, 1934, and March 12, 1934, in Bureau of Animal Industry, Docket No. 402. It is the duty of the District Attorney of the Northern District of Illinois and of the Attorney General of the United States to prosecute civilly for the recovery of penalties and forfeitures and to prosecute criminally for fines and imprisonment. The Secretary further is empowered to and may endeavor to suspend the registration of the plaintiffs and petitioners for their alleged violations of Packers and Stockyards Act, 1921.

19. The plaintiffs and petitioners are in the dilemma of being required under the Act to put into operation on November 1, 1935, the schedule hereto attached and marked "Exhibit A", lawfully adopted, filed, and published, under the pain of fines, imprisonment, and forfeitures for failure so to do; and on the other hand are being threatened by the Secretary with further and other fines and forfeitures for putting such schedule into effect.

20. The plaintiffs and petitioners charge that if the Packers and Stockyards Act, 1921, permits and is interpreted to authorize the Secretary, as in his letter of October 26, 1935, is stated, to refuse to file a lawfully adopted, published and submitted schedule and to reject such schedule on the ground that litigation is pending and on the ground that no change in rates may be made except by the Secretary, the act is unconstitutional and violative of the provisions of the United States constitution in that it empowers an administrative officer to issue orders and make determinations without investigation or hearing, and upon his whim or caprice and by his arbitrary action to nullify the Acts of Congress, thereby depriving market agencies subject to the Act, of life, liberty, or property without due process of law and confiscating the property of such market agency.

21. Wherefore petitioners pray:

(a) That process issue immediately out of and under the seal of this Court directed to said defendants, United States of America; Henry A. Wallace, Secretary of Agriculture of the United States of America; Homer S. Cummings, Attorney General of the United States of America; and Michael Igoe, United States District Attorney for the Northern District of Illinois, Eastern Division, requiring said defendants, and each of them, on a day certain to be specified in said process, to be and appear before this Court and to answer this petition and bill, but not under oath, answer under oath being hereby expressly waived;

(b) That this Court, or a Court constituted as required by the Laws of the United States, be convened and that said Court so constituted and convened, shall hear this petition and bill and all motions, petitions, proceedings, or hearings properly arising therefrom or thereunder;

(c) That upon the filing of this petition and bill, a Judge of this Court shall call to his assistance two other Judges, one of whom shall be a Circuit Judge;

(d) That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the Orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402; and from interfering in any manner, civil or criminal, with the collection of rates and charges specified in the schedule or tariff attached as Exhibit A to this petition and complaint, and from threatening to interfere with the collection of the rates and charges specified in such schedule, and enjoining and restraining the Secretary of Agriculture from suspending the registration of any of the petitioners and plaintiffs because of his or its collection of the rates and charges in such schedule,—all until the further order of the Court;

22 (e) That this Court upon final hearing make such interlocutory injunction permanent;

(f) That the plaintiffs have and recover of the defendants the proper costs of this suit;

(g) That petitioners have such other and further relief in the premises as to the Court may seem just and equitable.

ALAN F. WILSON,
For the Petitioners, Frank Connor, Alan F. Wilson, Charles G. Smith, and M. B. Morgan, a partnership, doing business as John Clay & Company.

GEO. I. HAIGHT,
JOHN S. BOYD,
M. K. HOBBS,
Solicitors for all the Petitioners.

[*Duly sworn to by Alan F. Wilson; jurat omitted in printing.*]

23 *Exhibit A to petition and complaint*

United States Department of Agriculture

Bureau of Animal Industry

The Chicago Live Stock Exchange

Schedule of rates at the Union Stock Yards, Chicago, Illinois, issued Oct. 19, 1935. Effective Nov. 1, 1935.

This Tariff supersedes all Tariffs and amendments heretofore filed for the buying and selling of live stock.

DEFINITIONS

(1) A CONSIGNMENT, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day.

(2) A CONSIGNMENT, for the purpose of assessing buying charges, is all the livestock of one species bought at any time but shipped or delivered to one person on one market day.

(3) A DRAFT is all those animals in one consignment weighed as a single sales or purchase classification.

(4) A PERSON is an individual, a partnership, a corporation, and/or association of any such acting as a unit.

(5) CALVES are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 400 pounds or under.

(6) LIGHT WEIGHT CATTLE are animals of the bovine species, weighed in drafts, the average weight of the animals in which is from 401 pounds to 800 pounds.

(7) MEDIUM WEIGHT CATTLE are animals of the bovine species, weighed in drafts, the average weight of the animals in which is from 801 to 1,200 pounds.

(8) HEAVY WEIGHT CATTLE are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 1,201 pounds or over.

(9) PIGS are swine, weighed in drafts, the average weight of the animals in which is 130 pounds or under.

(10) HOGS are swine, weighed in drafts, the average weight of the animals in which is 131 pounds or over.

24 *Selling charges*

SECTION A. CATTLE AND CALVES

Calves:	
Consignments of one head	50c per head
Consignments of more than one head:	
1 to 20 head inclusive	40c per head
Each head over 20	20c per head
Lightweight cattle:	
Consignments of one head	80c per head
Consignments of more than one head:	
1 to 20 inclusive	70c per head
Each head over 20	60c per head
Mediumweight cattle:	
Consignments of one head	90c per head
Consignments of more than one head:	
1 to 20 head inclusive	80c per head
Each head over 20	70c per head
Heavyweight cattle:	
Consignments of one head	$1.00 per head
Consignments of more than one head:	
1 to 20 head inclusive	90c per head
Each head over 20	80c per head

SECTION B. SWINE

Pigs:	
Consignments of one head	35c per head
Consignments of more than one head:	
1 to 40 head inclusive	20c per head
Each head over 40	10c per head
Hogs:	
Consignments of one head	45c per head
Consignments of more than one head:	
1 to 40 head inclusive	30c per head
Each head over 40	15c per head

SECTION C. SHEEP OR GOATS

Sheep or goats:	
Consignments of one head	35c per head
Consignments of more than one head:	
For the first 10 head in each 300 head	30c per head
For the next 50 head in each 300 head	15c per head
For the next 60 head in each 300 head	6c per head
For the next 130 head in each 300 head	4c per head
For the next 50 head in each 300 head	1c per head

EXTRA SERVICE CHARGES

The following extra-service charges are applicable to each consignment:

For each additional weight draft over 3, on account of sales classification	15c
For each additional check, each additional account of sales, each proceeds deposit or bank credit, over 1	5c

SECTION D. BUYING CHARGES

Cattle bought in carload lots for either beef or feeding purposes, 50c per head, minimum $10.00 per carload, maximum $15.00 per carload. Pick-up cars of cattle where bought and picked up in three or more lots the commission shall be $15.00 per carload. Bulls $15.00 per carload. Milkers and springers $1.00 per head. Mixed carloads of cattle, including milkers and springers, the regular charge of $1.00 per head will be made for milkers and springers, and 50 cents per head for others not to exceed $20.00 per carload.

25 Veal calves, single deck carload $15.00; double deck carload $20.00.

For all cars of hogs weighing on an average of over 140 pounds, shipped in either single or double deck cars, the charge shall be $10.00 per car. For all hogs averaging 140 pounds or less, shipped in either single or double deck cars, the charge shall be $15.00 per car.

Sheep or goats for slaughter purposes, single deck carloads $10.00; double deck carloads $15.00. Sheep or goats for feeding or breeding purposes, single decks $11.00; double decks $16.00.

In instances where less than a carload of cattle, calves, hogs, sheep, or goats, are purchased; on less than 14 head of cattle shipped in one car, the commission shall be 90c per head, and provided, that on less than 40 calves shipped in one car, the commission shall be 40c per head, and provided, that on less than 40 hogs shipped in one car, the commission shall be 30c per head, and provided, that on less than 50 head of sheep or goats shipped in one car, the commission shall be 20c per head.

Provided, however, that the charges to be collected for buying livestock shall in no instance exceed those for selling as provided for in this tariff.

The purchase of any of the foregoing classes of stock, when paid for by the market agency, shall, if assistance has been rendered by it, its agents or employees in making the purchase, be deemed a

purchase within the meaning of this section, and charged for at the above named rates.

E. M. Hughes,
E. M. Hughes,
Secretary, The Chicago Live Stock Exchange, On Behalf of Each Firm or Market Agency Affiliated With the Exchange.

Live Stock Exchange Building, Chicago, Illinois (address of all the undersigned on this and following page):

Schultz, L. S., Comm. Company, by C. H. Schultz.
Walters & Dunbar, by Jas H. Dunbar.
Stafford Bros., by S. B. Stafford.
Kuenster Live Stock Comm., by E. H. Kuenster.
Miller, White & Woods, by J. L. Jones, Treas.
Peterson, Turnbull & Co., by W. A. Peterson.
W. O. Jennings & Co., by W. O. Jennings.
Martin Born & Co., by W. S. Burmister.
E. F. Woelfer & Co., by E. F. Woelfer.
26 Max Farley.
McCausland, Hoag & Vaughan, per E. L. Vaughan, Prest.
Alexander, Conover & Co., by George S. Conover, Treas.
National Live Stock Com. Co., by E. G. Fulkerson, Pres.
Hatch, L. S., Com. Co., by Fred Hatch.
Lawler Bros. & Co., by E. J. Lawler.
Rice Bros., by Chas. R. Rice.
St. John, Compton, Dunbar Co., by R. E. Compton.
Murray & McDowell, by A. R. Jenkins.
Northwestern Live Stock Com. Co., by D. M. Woods, Treas.
Johnson Commission Company, by R. E. Johnson.
Lyman Keys Commission Co., by Lyman Keys.
27 Clark, Bowles & Co., by E. A. Clark.
Conklin Bros. Com. Co., by Morton Conklin, Pres.
Alex Rinderle Co., by A. E. Rinderle.
Silas Palmer & Sons, by W. H. Palmer.
George W. Hull.
Joseph F. Nash.
L. Spencer and Company, L. Spencer.
Moon and Unthank, by P. B. Unthank.
Filler Wilson & McClelland., by P. A. Filler, V. P.
John Patterson & Son, by W. C. Patterson.
Wm. R. Smith & Son, by J. C. Eastin.
Starrett L. S. Comm. Co., by M. E. Peschong.
Rosenbaum Bros. & Co.: by A. Wertheimer, President.
H. D. Copeland & Company, by C. H. Boortroyd, President.
Wm. Gentleman & Sons, by Wm. Gentleman.
28 J. A. Frazier & Sons, by Wm. Gentleman.
Standard Live Stock Commission Co., by Ray Alvin Keys, Pres.
Frank Keys, Inc., Ray Alvin Keys, Pres.

Roberts and Mills Company, by W. A. Roberts.
Geo. M. Brounson Co., by Geo. M. Brounson.
Swiney Brothers, by F. E. Swiney.
Mullen Commission Company, by Norman E. Barnes.
Mutual Live Stock Com. Co., by H. H. Castle, Pres.
Art Humburt Commission, by Arthur Humburt.
Nalley L. S. Com. Co., by Will J. Nalley.
Cochran Henneberry & Wallace, by R. W. Wallace.
Brott Live Stock Com. Co., by W. H. Brott.
Irvine H. Murray.
29 C. H. Moberly.
H. O. Thompson & Co., per H. O. Thompson.
Quinn Com. Company, per John E. Quinn.
Greenwoood Commission Co., by Geo. J. Greenwood.
T. K. Polley & Co., by T. K. Polley.
Sherwood & Son.
R. H. Sherwood.
Iowa Live Stock Com. Co., by F. K. Surbect, Pres.
Dunbar, St. John & Company, by Harlow C. Dunbar.
Gillogly & Co., by R. E. Gillogly.
Schroeder L. S. Com. Co., by A. C. Schroeder.
Sarsfield, Schrock and Kuenster, by J. P. Sarsfield.
Merrion & Wilkins, J. L. Merrion.
Roach L. S. Com. Co., by W. S. Roach.
30 G. C. Peters and Company, by G. C. Peters.
Ennes Sider Buel Com. Co., C. L. Buel.
Adler Sons & Co., by A. E. Adler.
J. A. Strachan & Co., by J. A. Strachan.
C. W. Hart Com. Co., by C. W. Hart.
Dolan Ludeman & Co., by P. T. Dolan.
Halpin, L. S. Com. Co., by F. J. Halpin.
Adams, Corrick and Keleher, by J. M. Corrick.
Callahan Live Stock Commission Company, by M. J. Callahan.
Lester W. Hatch & Co., by Lester W. Hatch.
Haime & Reneker, by G. J. Reneker.
31 Dolan Sinnard and Co., by T. J. Sinnard.
Central Live Stock Commission Company, by M. A. McDermott.
Norris and Dunning, by H. L. Dunning.
Wood Brothers, by F. E. Bent.
J. B. Hatch and Co., by J. B. Hatch.
Hefner Commission Co., by F. A. Hefner.
Glen K. Wood & Company, per Glen K. Wood.
Ingwersen, Mosier & Ingwersen, Inc., by D. C. Mosier.
Abe Burnett & Co., by Charles L. Burnett.
Geo. W. Von Berner.
Kirby Bros., L. S. Com. Co., by Donald J. Kirby.
Swanson, Gilmore & Castenholz, By A. Gilmore.

Minteer, Hubbard & Co., per G. Hixon.
32 W. E. Young & Co., by W. E. Young.
A. P. Schmal.
Benton & Co., L. S. Com., by G. A. Benton.
Sheldon Comm. Co., by F. W. Sheldon.
Stockmen's L. S. Com. Co., by Samuel Kent, Pres.
Will C. Wood and Company, by Will C. Wood.
Harry L. Carpenter, by E. M. Hughes.
David C. Wagner.
Feldes Commission Company, by Erwin J. Feldes.
I. O. Fry.
Holloway & Ogren, by E. Holloway.
Wm. Daniel.
Baker, Heyne & Co., by E. H. Baker.
33 E. J. Gibbons and Company, by E. J. Gibbons.
Chas. E. Harding Co., by Chas. E. Harding, Jr.
Bowles Live Stock Com. Co., by J. P. Bowles, Prest.
Charles O. Robinson Company, by C. O. Robinson.
Barton, Looney & Kennedy, by Tom Looney.
Fred Freeman.
Hafner Nixon Co., by [illegible] Hafner.
C. E. Nixon.
C. E. Nixon & Co. (Inc.), by C. E. Nixon, President.
Drovers Commission Co., by P. E. Wroe.
Knettle Bros., by E. Knettle.
34 E. Egan & Company, by E. H. Egan.
A. J. Labarthe.
Walter Brothers, by Ralph A. Walter.
Ettlinger, T. S. Com. Co., by J. T. Ettlinger.
Louis Armbrecht Commission Co., by Louis Armbrecht.
Clarence M. Brown.
John Clay and Company, by Alan F. Wilson.
C. A. Keeman, by Alan F. Wilson.
Guy L. Wheeler & Co., by Guy L. Wheeler.

36 In United States District Court

[Title omitted.]

Affidavit of E. M. Hughes

Filed Nov. 1, 1935

STATE OF ILLINOIS,
County of Cook, ss:

E. M. HUGHES, being first duly sworn, on oath deposes and says that he is an adult citizen of the United States residing in the City of Chicago, State of Illinois; that a printed copy of the schedule

of rates and charges of the live stock commission agencies at the Chicago Union Stock Yards, which schedule is attached as Exhibit A to the Bill of Complaint herein, was posted on October 17, 1935, and has since remained so posted, upon the bulletin board on the first floor of the Live Stock Exchange Building, Union Stock Yards, Chicago, Illinois; that a printed copy was posted October 17, 1935, and has since remained so posted, on the wall of the office of the Secretary of the Chicago Live Stock Exchange on the ninth floor of the aforesaid building; that the aforesaid places are conspicuous public places; that in addition each market agency who subscribed the said schedule has, since October 18, 1935, kept posted in his or its office in a conspicuous public place the aforesaid schedule;

37 that on October 17, 1935, your affiant mailed, for filing, to the Bureau of Animal Industry of the Department of Agriculture, Washington, D. C., the original of said schedule signed by the subscribing market agencies, together with two copies thereof; said original and copies were received by the Bureau and Department on October 19, 1935; that said schedule plainly states all rates and charges in detail, and also states rules and regulations which in any manner affect or determine the rates or charges; that the said schedule complies with the regulations of the Secretary in its physical form and size and in its division in sections for the various classes of services furnished; that said schedule bears the publication date October 19, 1935, on which date it was received by the Department of Agriculture and also bears the effective date November 1, 1935, and that said schedule was filed, posted, and published more than ten (10) days before the effective date thereof.

A printed copy of the schedule referred to herein is attached hereto.

Further affiant saith not.

E. M. HUGHES.

Subscribed and sworn to before me this 31st day of October 1935.

FRANCES SAVAGE,
Notary Public.

My Commission Expires: Oct. 4, 1936.

38 *Exhibit to affidavit*

United States Department of Agriculture

Bureau of Animal Industry

The Chicago Live Stock Exchange

Schedule of rates at the Union Stock Yards, Chicago, Illinois, issued Oct. 19, 1935. Effective, Nov. 1, 1935.

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DEFINITIONS

(1) A CONSIGNMENT, for the purpose of assessing selling charges, is all the livestock of one species delivered in the name of one person to one market agency to be offered for sale during the trading hours of one day.

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(4) A PERSON is an individual, a partnership, a corporation, and/or association of any such acting as a unit.

(5) CALVES are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 400 pounds or under.

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(8) HEAVYWEIGHT CATTLE are animals of the bovine species, weighed in drafts, the average weight of the animals in which is 1,201 pounds or over.

(9) PIGS are swine, weighed in drafts, the average weight of the animals in which is 130 pounds or under.

(10) HOGS are swine, weighed in drafts, the average weight of the animals in which is 131 pounds or over.

Selling charges

SECTION A. CATTLE AND CALVES

Calves:	
Consignments of one head	50c per head
Consignments of more than one head:	
1 to 20 head inclusive	40c per head
Each head over 20	20c per head
Lightweight cattle:	
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SECTION B. SWINE

Pigs:	
Consignments of one head	35c per head
Consignments of more than one head:	
1 to 40 head inclusive	20c per head
Each head over 40	10c per head
Hogs:	
Consignments of one head	45c per head
Consignments of more than one head:	
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SECTION C. SHEEP OR GOATS

Sheep or goats:	
Consignments of one head	35c per head
Consignments of more than one head:	
For the first 10 head in each 300 head	30c per head
For the next 50 head in each 300 head	15c per head
For the next 60 head in each 300 head	6c per head
For the next 130 head in each 300 head	4c per head
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EXTRA SERVICE CHARGES

The following extra service charges are applicable to each consignment:

For each additional weight draft over 3, on account of sales classification	15c
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SECTION D. BUYING CHARGES

Cattle bought in carload lots for either beef or feeding purposes, 50c per head, minimum $10.00 per carload, maximum $15.00 per carload. Pick-up cars of cattle where bought and picked up in three or more lots the commission shall be $15.00 per carload. Bulls $15.00 per carload. Milkers and springers $1.00 per head. Mixed carloads of cattle, including milkers and springers, the regular charge of $1.00 per head will be made for milkers and springers, and 50 cents per head for others not to exceed $20.00 per carload.

39 Veal calves, single deck carload $15.00; double deck carload $20.00.

For all cars of hogs weighing on an average of over 140 pounds, shipped in either single or double deck cars, the charge shall be $10.00 per car. For all hogs averaging 140 pounds or less, shipped in either single or double deck cars, the charge shall be $15.00 per car.

Sheep or goats for slaughter purposes, single deck carloads $10.00; double deck carloads $15.00. Sheep or goats for feeding or breeding purposes, single decks $11.00; double decks $16.00.

In instances where less than a carload of cattle, calves, hogs, sheep or goats, are purchased; on less than 14 head of cattle shipped in one car, the commission shall be 90c per head, and provided, that on less than 40 calves shipped in one car, the commission shall be 40c per head, and provided, that on less than 40 hogs shipped in one car, the commission shall be 30c per head, and provided, that on less than

50 head of sheep or goats shipped in one car, the commission shall be 20c per head.

Provided, however, that the charges to be collected for buying livestock shall in no instance exceed those for selling as provided for in this tariff.

The purchase of any of the foregoing classes of stock, when paid for by the market agency, shall, if assistance has been rendered by it, its agents or employees in making the purchase, be deemed a purchase within the meaning of this section, and charged for at the above named rates.

E. M. HUGHES,
Secretary, The Chicago Live Stock Exchange,
On Behalf of Each Firm or Market Agency
Affiliated With the Exchange.

Live Stock Exchange Building, Chicago, Illinois:

Adams, Corrick and Keleher, Adler, Sons & Co., Alexander, Conover & Company, Inc., Louis Armbrecht Commission Co., Baker, Heyne & Co., Barton, Looney & Kennedy, Benton & Co., L. S. Com., Bowles Live Stock Com. Co., Brott Live Stock Com. Co., Clarence M. Brown, Geo. M. Brownson & Co., Abe Burnett & Co., Callahan Live Stock Commission Company, Harry L. Carpenter, Central Live Stock Commission Company, Clark, Bowles & Co., John Clay and Company, Cochran, Henneberry & Wallace, Conklin Bros. Com. Co., H. D. Copeland & Co., Wm. Daniel, Dolan, Ludeman & Co., Dolan, Sinnard and Co., Drovers Commission Co., Dunbar, St. John & Company, E. Egan & Company, Ettlinger L. S. Com. Co., Evans, Snider, Buel Com. Co., Max Farley, Feldes Commission Company, Filler, Wilson & McClelland, J. A. Frazier & Sons, Fred Freeman, I. O. Fry, Wm. Gentleman & Sons, E. J. Gibbons and Company, Gillogly & Co., Greenwood Commission Co., Hafner Nixon Co., Haime & Reneker, Halpin L. S. Com. Co., Chas. E. Harding Co., C. W. Hart Com. Co., J. B. Hatch and Co., Lester W. Hatch & Co., Hatch L. S. Com. Co., Hefner Commission Co., Holloway & Ogren, George W. Hull, Art Humbert Commission, Ingwersen, Mosier & Ingwersen, Inc., Iowa Live Stock Com. Co., W. O. Jennings, Johnson Commission Company, Frank Keys, Inc., Lyman Keys Commission Co., Kirley Bros. L. S. Com. Co., C. A. Kleman, Knettle Bros., Kuenster Live Stock Comm., A. J. LaBarthe, Lawler Bros. & Co., Martin Bros. & Co., McCausland, Hoag & Vaughn, Merrion & Wilkins, Miller, White & Woods, Minteer, Hubbird & Co., C. H. Moberly, Moon and Unthank, Mullen Commission Company, Murray & McDowell, Irvine H. Murray, Mutual Live Stock Com. Co., Nally L. S. Com. Co., Joseph F. Nash, National Live Stock Com. Co., C. E. Nixon, C. E. Nixon & Co., Inc., Norris and Dunning, Northwestern Live Stock Com. Co., Silas Palmer & Sons, John Patterson & Son, G. C. Peters & Company, Peterson, Turnbull & Company, T. K. Polley & Co., Quinn Commission Company, Rice Bros., Alex Rinderle Co., Roach L. S. Com. Co., Roberts and Mills Company, Charles O.

Robinson Company, Rosenbaum Bros. & Co., Sarsfield, Schrock and Kuenster, A. P. Schmal, Schroeder L. S. Com. Co., Schultz L. S. Comm. Company, Sheldon Comm. Co., Sherwood & Son, Wm. R. Smith & Son, L. Spencer & Company, Stafford Bros., Standard Live Stock Commission Company, Starrett L. S. Comm. Co., St. John Compton Dunbar Co., Stockmen's L. S. Com. Co., J. A. Strachan & Co., Swanson, Gilmore & Castenholz, Swiney Brothers, H. O. Thompson & Co., Geo. W. Von Berner, David C. Wagner, Walter Brothers, Walters & Dunbar, Guy L. Wheeler & Co., E. F. Woelfer & Co., Wood Brothers, Glen K. Wood & Company, Will C. Wood & Company, W. E. Young & Co.

40 In United States District Court

[Title omitted.]

Order convening statutory court

Nov. 1, 1935

Pursuant to the provision of Packers and Stockyards Act, 1921, and Section 47, Title 28, U. S. Code, on application to me by the plaintiffs in the above entitled cause to convene a Statutory Court and for an injunction, I hereby call to my assistance for the hearing of said application and cause Honorable Samuel Alschuler, a Judge of the Circuit Judge of Appeals of this Circuit, and the Honorable James H. Wilkerson, District Judge of the United States for the Northern District of Illinois.

Dated: November 1, 1935.

BARNES, *District Judge.*

41 In United States District Court for the Northern District of Illinois, Eastern Division

Equity No. 14900

ADAMS, CORRICK & KELEHER, ETC., ET AL.

vs.

UNITED STATES OF AMERICA, ET AL.

Before ALSCHULER, Circuit Judge, and WILKERSON and BARNES, District Judges

Opinion

Nov. 19, 1935

PER CURIAM: Under the present status of the case, there is reason to believe that:

(1) Under the Packers and Stockyards Act, 1921 (Title 7, U. S. C. A., Chap. 9), the market agencies are the primary rate makers for their services.

(2) The fact that the Secretary of Agriculture has acted in respect of the rates and charges of the plaintiffs does not deprive them of the right thereafter to initiate rates.

(3) The schedule of rates and charges tendered by the plaintiffs to the Secretary of Agriculture for filing on October 19, 1935, was properly tendered and should have been received and filed by the Secretary.

(4) The Secretary's contention that because of the pendency in the United States Supreme Court of an appeal from the decree of this court in Acker et al. v. United States et al., Equity No. 13829, no new schedule of rates may be presented to the Secretary for filing in his office until such appeal is determined, is untenable; and refusal of the Secretary to receive and file the schedule of rates and charges so tendered was arbitrary and without authority of law.

(5) Such refusal to receive and file did not destroy or affect the effectiveness of the filing of said schedule.

42 (6) The rates and charges, shown by the aforesaid schedule, on November 1, 1935, became and now are the lawful rates and charges for the stockyard services furnished by the plaintiffs, and will continue to be the lawful rates and charges for such services until they are suspended or changed in a manner prescribed or permitted by law.

Wherefore, it is concluded that a preliminary injunction, which will, during the pendency of this case, give effect to the foregoing should issue.

The court will, on Monday, November 25, 1935, at 2 o'clock P. M., hear counsel on the question as to whether such injunction should issue on terms and, if on terms, on what terms.

At the same time, counsel will present, in writing, their respective suggestions as to findings of fact and conclusions of law, and as to the form of the decretal order.

SAMUEL ALSCHULER,
United States Circuit Judge.
JAMES H. WILKERSON,
United States District Judge.
JOHN P. BARNES,
United States District Judge.

43 In United States District Court

[Title omitted.]

* *Statement, findings of fact, and conclusions of law*

Dec. 3, 1935

Upon the filing with the clerk of this court on October 31, 1935, of plaintiffs' verified bill of complaint, a statutory court was assembled consisting of three judges, two of them United States district judges in the Seventh Judicial Circuit, and one of them a United States circuit judge for the said Seventh Judicial Circuit, in which

court, on November 8, 1935, there was heard the application of plaintiffs for an interlocutory injunction, pending final hearing and disposition of the cause, restraining the defendants as in and by their said bill of complaint prayed; at which hearing the defendants appeared and resisted plaintiffs' said application for an interlocutory injunction.

Upon the hearing of such application there was before the court the plaintiffs' said verified bill of complaint, together with the affidavit of one Hughes specifying that on October 17, 1935, he posted in public places at and about the principal offices of the several
44 market agencies of plaintiffs, and on the bulletin board of the Live Stock Exchange Building at the Union Stock Yards, Chicago, Ill., and on the wall of the office of the Secretary of the Chicago Live Stock Exchange, a printed copy of a schedule of rates and charges of the livestock commission agencies at Union Stock Yards, as it is set forth in Exhibit A of said bill of complaint, and in said affidavit.

Upon the hearing of such motion for interlocutory injunction no other evidence, oral or documentary, was submitted by either party, and there was before the court nothing save the said verified bill of complaint and affidavit, except as there was considered the decree and orders in the case of Acker et al. v. United States of America et al., being case No. 13,829, therefore pending in said court, and heard and decided by a statutory court of three judges whose personnel was the same as it is in the instant cause.

Upon a consideration of the aforesaid instrumentalities, and for the purpose only of adjudication of the plaintiffs' said application for an interlocutory injunction herein, the court makes the subjoined findings of fact and conclusions of law.

Findings of fact

1. Plaintiffs are registered market agencies at the Union Stock Yards, Chicago, Illinois, which yard has been posted as a stockyard under Packers and Stockyards Act of 1921; and each of plaintiffs has its principal office in this judicial district and division.

2. The subject-matter of said bill of complaint arose and exists in this judicial district and division.

45 3. On January 8, 1934, the Secretary of Agriculture issued an order, and on March 12, 1934, a supplemental order, prescribing a schedule of rates and charges for the market agencies at the Union Stock Yards, Chicago.

4. On March 19, 1935, and theretofore, there was pending in the District Court of this district and division, before a statutory three-judge court, the bill of complaint brought by substantially all of the market agencies who in the instant suit are the plaintiffs, and wherein it was charged that the rates which had been prescribed by the Secretary of Agriculture on January 8, 1934, and by him supplemented on March 12, 1934, were unreasonable, arbitrary, and void; and on said March 19, 1935, the said statutory court, having

heard the said cause upon its merits, entered a decree dismissing said bill of complaint in accordance with findings of fact and conclusions of law made theretofore on December 31, 1934, by the said court; and thereafter, on motion of the defendants in said cause, the court allowed an appeal to the United States Supreme Court from its said decree of March 19, 1935, but continued in force an interlocutory injunction which the court had theretofore entered against enforcement of the rates and charges so prescribed by the Secretary of Agriculture, conditioned upon the deposit by the several market agencies with the clerk of this court of the difference between the rates and charges which would be collected under the schedule of rates previously in force and the reduced schedule of rates as prescribed by the schedule of January 8, 1934, as supplemented by the order of March 12, 1934, such deposits to be held by the clerk of this court for disposition in such manner as would ultimately be
46 adjudicated. Such order for appeal so granted on motion of the plaintiffs in that suit is still in force and effect, and from time to time orders have been entered by the court wherein that decree was entered, extending the time for filing in the United States Supreme Court the transcript of record upon such appeal.

5. On October 19, 1935, the plaintiffs tendered and submitted to the Secretary of Agriculture at Washington, D. C., for filing in his office, a schedule of rates and charges for services of market agencies at the Union Stock Yards at Chicago, to be effective on November 1, 1935, which rates and charges are in most instances materially higher than the rates and charges for such services as specified in the schedule of the Secretary of Agriculture of January 8, 1934, and his supplemental schedule of March 12, 1934, such schedule of rates and charges so tendered and submitted to the Secretary of Agriculture having theretofore been duly and publicly posted as required by law. The schedule of rates and charges so tendered and submitted to the Secretary of Agriculture is set forth in Exhibit A of the bill of complaint herein, and also in the Hughes affidavit above referred to.

6. The Secretary of Agriculture refused to retain and to file in his office the schedule of rates and charges thus tendered to him by plaintiffs herein for filing, and at once returned the schedule to the plaintiffs, stating as his ground for rejection of the schedule and refusal to file it:

(a) "'that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding"; and

(b) "The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders (in Bureau of Animal Industry Docket 402)."

47 7. After the refusal of the Secretary of Agriculture to retain and to file said schedule and his return of it to the

plaintiffs, the Secretary gave no notice of suspension of the schedule of rates and took no action whatever to suspend the tendered schedule of rates, and has since then taken no action whatever to supersede or alter the rates and charges specified in such schedule so tendered him for filing.

8. If under the Packers and Stockyards Act the schedule of rates thus tendered to the Secretary of Agriculture for filing became effective on and after November 1, 1935, then in such case the plaintiffs were and are subject to prosecution and penalization if they did not put those rates and charges into effect. On the other hand, the Secretary of Agriculture and the United States District Attorney for the Northern District of Illinois maintain that the schedule of rates of January 8, 1934, as supplemented by the schedule of March 12, 1934, as theretofore fixed by the Secretary of Agriculture, remained and were and are the lawful rates, notwithstanding the schedule of rates tendered to the Secretary October 19, 1935; and there thus arose and exists a situation where the plaintiffs were and are threatened with prosecution, civil and criminal, whichever course they may adopt.

9. Immediate and irreparable injury and damage to plaintiffs will in all likelihood ensue unless an interlocutory injunction as prayed be ordered.

Conclusions of law

1. This court has jurisdiction of the subject-matter of this suit and of the parties thereto.

48 2. Under the Packers and Stockyards Act of 1921, the market agencies are the primary rate makers for their services.

3. The fact that the Secretary of Agriculture had previously acted to fix rates and charges of these market agencies does not thereafter deprive the market agencies of the right to initiate and file lawful rates for their services in the manner provided by the Packers and Stockyards Act, which thereupon become the lawful rates, subject to their suspension by the Secretary of Agriculture, and to being superseded by the Secretary, in manner and form as in said Packers and Stockyards Act provided.

4. Upon the facts appearing at the hearing of the application for the interlocutory injunction, the said schedule of rates, which was on October 19, 1935, tendered by plaintiffs to the Secretary of Agriculture for filing in his office, was properly tendered and should have been retained and filed in the office of the Secretary of Agriculture.

5. The rejection by the Secretary of Agriculture of the schedule of rates and charges tendered him by plaintiffs, and his refusal to file it, upon the grounds set forth in the findings of fact herein, was unreasonable, arbitrary, and without authority of law.

6. The filing in the office of the Secretary of Agriculture of a schedule of such rates lawfully tendered to him by the market agencies is a ministerial act; and he cannot, by arbitrarily refus-

ing to file the tendered schedule, render unlawful and ineffective a schedule of rates which, had it been filed, would have been the lawful schedule of rates and charges, unless thereafter suspended or superseded by the Secretary as provided by law.

49 7. The fact that at the time of the tender of the schedule of rates in question to the Secretary of Agriculture for filing, there was pending and undetermined in the United States Supreme Court an appeal from the decree of the District Court which had held valid a prior schedule of rates which had been fixed by the Secretary of Agriculture, did not, during such pendency, deprive market agencies of the right to initiate new rates so initiated by the market agencies being subject to suspension and supersession by the Secretary of Agriculture in manner and form as in said Packers and Stockyards Act provided.

8. Upon the record which is before us, the schedule of rates as posted and as tendered to the Secretary of Agriculture for filing on October 19, 1935, became effective on November 1, 1935, and from that date constituted the lawful rates and charges for the market agency services of the plaintiffs, unless and until such schedule of rates is suspended by the Secretary of Agriculture, or is by him, or otherwise, changed or superseded in manner and form as provided by law.

9. Plaintiffs may, and in all likelihood will, suffer irreparable injury and damage unless an interlocutory injunction as prayed be granted.

(Signed) SAMUEL ALSCHULER,
U. S. Circuit Judge.
JAMES H. WILKERSON,
U. S. District Judge.
JOHN P. BARNED,
U. S. District Judge.

CHICAGO, ILLINOIS, *December 3, 1935.*

50 In United States District Court for the Northern District of Illinois, Eastern Division

In Equity No. 14900

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP, ET AL.

vs.

UNITED STATES OF AMERICA, HENRY A. WALLACE, SECRETARY OF AGRICULTURE, HOMER S. CUMMINGS, ATTORNEY GENERAL, AND MICHAEL IGOE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS

Order for interlocutory injunction

Dec. 3, 1935

This cause coming on to be heard upon the verified bill of complaint of the plaintiffs and an affidavit filed in support thereof, and

upon the motion of plaintiffs for the issuance of an interlocutory injunction herein restraining the defendants pendente lite from doing those things asked to be restrained in and by the said bill of complaint, and the court having heard the arguments of counsel, and being fully advised in the premises, finds that immediate and irreparable injury and damage to plaintiffs will likely ensue unless there be granted an interlocutory injunction as prayed.

It is therefore ordered by the court That a writ of injunction issue out of and under the seal of this court restraining and enjoining, until the further order of this court, the defendants, Henry A. Wallace, Secretary of Agriculture, Homer S. Cummings, Attorney General, and Michael Igoe, United States District Attorney for the Northern District of Illinois, and all the officers, attorneys, solicitors, agents, and representatives of the United States, and all other persons acting or claiming or assuming to act for and under the authority of the defendants, or any of them, from preventing or attempting to prevent, or from interfering with the plaintiffs and each of them in their several capacities as market agencies, from collecting, demanding, receiving, and retaining, the rates and
51 charges for their market agency stockyards services at the Union Stock Yards, in Chicago, Illinois, as they are fixed and prescribed by the schedule of rates and charges of plaintiffs which were tendered for filing to the Secretary of Agriculture October 19, 1935, to be effective November 1, 1935, a copy of which schedule is attached to the bill of complaint herein as Exhibit A thereof. And that each and all of such persons be restrained, until the further order of the court, from instituting, prosecuting, or aiding in instituting or prosecuting, any proceeding or action against the plaintiffs, or either or any of them, for the imposition or recovery of any penalties, fines, forfeitures, or imprisonment because of any demand for and collection of the rates and charges, or any of them, as in said schedule of rates and charges so effective November 1, 1935, is prescribed. And that the said Henry A. Wallace, Secretary of Agriculture, and any person or persons acting or assuming to act for or under him, be enjoined and restrained, until the further order of the court, from suspending the registration as market agencies of all or any of plaintiffs because of their, his, or its demand for, or collection of, the stockyards market agency rates and charges for services as prescribed and set forth in such schedule of rates and charges so effective November 1, 1935.

It is further ordered that, as a condition for the issuance of this injunction, the petitioners do forthwith enter into and file with the clerk of this court an injunction bond in the penal sum of Fifty Thousand Dollars ($50,000), with security to be approved by
52 the court, conditioned that in case it is ultimately adjudicated that such schedule of rates and charges so tendered to the Secretary of Agriculture on October 19, 1935, did not become and was not the lawful schedule of rates and charges for plaintiffs' stockyards market agency services, then each of the said plaintiffs

shall promptly repay to the several shippers to them of live stock whereon there shall have been collected by plaintiffs, or any of them, the rates and charges specified in the said schedule so tendered to the Secretary of Agriculture on October 19, 1935, the several amounts by which the rates and charges so collected for stockyards market agency services shall exceed the rates and charges which, but for said schedule of rates so tendered to the Secretary of Agriculture on October 19, 1935, would have been the lawful rates and charges for the plaintiffs' stockyards market agency services; and further conditioned as this court may approve.

SAMUEL ALSCHULER,
U. S. Circuit Judge.
JAMES H. WILKERSON,
U. S. District Judge.
JOHN P. BARNES,
U. S. District Judge.

CHICAGO, ILLINOIS, *December 3, 1935.*

53 In United States District Court

[Title omitted.]

Petition for appeal

Filed Dec. 18, 1935

The defendants herein considering themselves aggrieved by the order for interlocutory injunction entered by this Court in the above cause on the 3rd day of December 1935, pray that they may be permitted to take an appeal therefrom to the Supreme Court of the United States for the reasons specified in the Assignment of Errors which is filed herewith, and the defendants pray that this appeal may be allowed and that a transcript of the record, proceedings, and papers upon which the order for interlocutory injunction was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
Special Assistant to the Attorney General.

Dated: December 16, 1935.

54 In United States District Court

[Title omitted.]

Assignment of errors

Filed Dec. 18, 1935

1. The Court erred in concluding as a matter of law that the fact that the Secretary of Agriculture had previously acted to fix rates

and charges for the plaintiffs did not thereafter deprive the plaintiffs of the right to initiate and file new rates for their services.

2. The Court erred in concluding as a matter of law that the schedule of rates and charges which on October 19, 1935, the plaintiffs tendered to the Secretary of Agriculture for filing was properly tendered and should have been retained and filed in the office of the Secretary of Agriculture.

3. The Court erred in concluding as a matter of law that the rejection by the Secretary of Agriculture of the schedule of rates and charges tendered by the plaintiffs on October 19, 1935, and the refusal of the Secretary of Agriculture to file such schedule, was unreasonable, arbitrary, and without authority of law.

4. The Court erred in concluding as a matter of law that the fact that at the time of the tender of the schedule of rates and charges in question to the Secretary of Agriculture for filing there was pending and undetermined in the United States Supreme
55 Court an appeal from the decree of the District Court which had held valid a prior schedule of rates fixed by the Secretary, did not, during such pendency, deprive market agencies of the right to initiate new rates pursuant to the Packers and Stockyards Act.

5. The Court erred in concluding as a matter of law that upon the record the schedule of rates as posted and as tendered on October 19, 1935, to the Secretary of Agriculture for filing became effective on November 1, 1935, and from that date constituted the lawful rates and charges for market agency services of the plaintiffs unless and until such schedule should be suspended by the Secretary of Agriculture.

6. The Court erred in concluding as a matter of law that under the Packers and Stockyards Act of 1921 the market agencies are the primary rate makers for their services.

7. The Court erred in not finding that after the Secretary of Agriculture has exercised his authority to prescribe just and reasonable rates and charges or maximum or minimum rates and charges applicable to the plaintiffs, the plaintiffs have no lawful right to file a schedule of new rates and charges.

8. The Court erred in not finding that the schedule of rates and charges which on October 19, 1935, the plaintiffs tendered to the Secretary of Agriculture for filing was unlawfully tendered and was properly rejected by the Secretary.

9. The Court erred in not finding that the Secretary of Agriculture properly and lawfully rejected the schedule of rates and charges tendered by the plaintiffs on October 19, 1935, and in not finding that his refusal to file such schedule was proper and lawful.

10. The Court erred in not finding that after rates and charges had been prescribed by the Secretary of Agriculture pursuant to authority lawfully conferred by the Packers and Stockyards Act,

the plaintiffs had no legal right to initiate new rates, and in not finding that the Packers and Stockyards Act does not confer
56 authority upon plaintiffs to initiate new rates under such circumstances.

11. The Court erred in not finding that the schedule of rates as posted and as tendered on October 19, 1935, to the Secretary of Agriculture for filing is null, void, and of no effect.

12. The Court erred in finding and concluding that immediate and irreparable injury and damage to the plaintiffs would in all likelihood ensue unless an interlocutory injunction be ordered as prayed.

13. The Court erred in not finding that the plaintiffs have an adequate remedy at law.

14. The Court erred in granting an interlocutory injunction and in entering the order for an interlocutory injunction.

15. The Court erred in failing to provide in the order for an interlocutory injunction for the impounding of the difference between the rates and charges prescribed by the orders of the Secretary of Agriculture dated January 8, 1934, and March 12, 1934, respectively, and the rates and charges which will be collected by the plaintiffs pursuant to such interlocutory injunction.

JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
Special Assistant to the Attorney General.

57 In United States District Court

[Title omitted.]

Order allowing appeal

Dec. 18, 1935

This 18th day of December 1935, came the defendants, by their attorneys, and filed herein and presented to this Court their petition praying for the allowance of an appeal to the Supreme Court of the United States from the order for interlocutory injunction entered by this Court on the 3rd day of December 1935, and assignment of errors intended to be urged by them, and praying also that a transcript of record, proceedings, and papers upon which the order for interlocutory injunction herein was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

On consideration whereof, the Court being advised in the premises.

It is ordered that an appeal to the Supreme Court of the United States from the order for interlocutory injunction heretofore made and entered herein be, and the same is, hereby allowed: and

It is further ordered that a certified transcript of the record, proceedings, and papers on which the order for interlocutory
58 injunction was made and entered be transmitted forthwith to the Supreme Court of the United States.

SAMUEL ALSCHULER,
Circuit Judge.
JAMES H. WILKERSON,
District Judge.
JOHN P. BARNES,
District Judge.

59 In United States District Court

[Title omitted.]

Stipulated praecipe for transcript of record on appeal

Filed Dec. 18, 1935

It is hereby stipulated by and between counsel for the respective parties hereto that the transcript of record on appeal in the above entitled cause shall consist of the items specified below. The Clerk of this Court will please prepare a transcript of record to be transmitted to the Supreme Court of the United States in pursuance of the appeal heretofore taken, and include therein the following:

1. Petition and complaint, filed October 31, 1935, including therein the exhibit thereto attached, namely the schedule of rates issued by the petitioners and appellees on October 19, 1935, to be effective November 1, 1935.
2. Affidavit of E. M. Hughes, filed November 1, 1935.
3. Order of Honorable John P. Barnes, District Judge, dated November 1, 1935, convening statutory court and setting hearing on November 8, 1935, on application for interlocutory injunction.
4. Per curiam memorandum opinion of the Court, filed November 19, 1935.

60 5. Statement, Findings of Fact, and Conclusions of Law, entered December 3, 1935.
6. Order for interlocutory injunction, entered December 3, 1935.
7. Petition for appeal, filed December , 1935.
8. Assignment of Errors, filed December , 1935.
9. Order allowing appeal, entered December , 1935.
10. Citation on Appeal, dated December , 1935.
11. Statement of appellants pursuant to Rule 12 of the Supreme Court respecting jurisdiction on appeal.
12. Acknowledgement of service upon petitioners and appellees of Citation on Appeal and other papers relating to the appeal.
13. This praecipe.

It is stipulated and agreed that the foregoing praecipe is correct and sufficient, and the petitioners- appellees waive service of a copy thereof and of notice of filing thereof.

JOHN DICKINSON,
WENDELL BERGE,
Counsel for Defendants-Appellants.
GEO. I. HAIGHT,
Counsel for Petitioners-Appellees.

61 [Clerk's Certificate to foregoing transcript omitted in printing.]

62 [Citation in usual form showing service on Geo. I. Haight et al., filed Dec. 18, 1935, omitted in printing.]

64 In Supreme Court of the United States

Statement of points to be relied upon and designation of the parts of the record to be printed

Filed Dec. 27, 1935

I

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this case are as follows:

1. Title III of the Packers and Stockyards Act (425 Stat. 159; U. S. C. A., Title 7, Secs. 181–229) provides that after rates and charges have been prescribed by order of the Secretary of Agriculture, they shall be thereafter observed and that the Secretary shall have the power to order that an operator in the stockyards shall not thereafter publish, demand, or collect any rate or charge in excess thereof, and that rates prescribed shall continue in force until the further order of the Secretary or unless such rates are suspended or modified by the Secretary or suspended or set aside by a court of competent jurisdiction; and after rates and charges have been prescribed by order of the Secretary, the Act does
65 not authorize the market agencies to publish and make effective schedules of rates and charges which do not comply with the order of the Secretary (Assignment of Errors Nos. 1, 4, 6, 7, 10).

2. Inasmuch as the Secretary of Agriculture had prescribed maximum rates and charges by orders dated January 8, 1934, and March 12, 1934, applicable to market agencies doing business on the Chicago stockyards, and those maximum rates and charges had been upheld as lawful by decree of the United States District Court for the Northern District of Illinois, dated March 19, 1935, the schedule of rates and charges published by such market agencies October 19, 1935, to be effective November 1, 1935 (since it did not comply with said orders of the Secretary), was null, void, and of no effect, and

the Secretary of Agriculture properly refused to receive the same for filing (Assignment of Errors Nos. 2, 3, 5, 8, 9, 11).

3. The Court erred in finding and concluding that immediate and irreparable injury and damage to the appellees would in all likelihood ensue unless an interlocutory injunction be ordered as prayed (Assignment of Errors No. 12).

4. The Court erred in not finding that the appellees had an adequate remedy at law (Assignment of Errors No. 13).

5. The Court erred in granting an interlocutory injunction (Assignment of Errors No. 14).

6. The Court erred in failing to provide in the order for an interlocutory injunction for the impounding of the difference between the rates and charges prescribed by the orders of the Secretary and rates and charges which will be collected by the appellees pursuant to such interlocutory injunction (Assignment of Errors No. 15).

66

II

And the appellants further state that all of the record certified by the District Court and filed in this Court should be printed by the Clerk of this Court for the hearing of this cause.

GOLDEN W. BELL,
Acting Solicitor General.

Dated December 27, 1935.

[File endorsement omitted.]

(Endorsement on cover:) File No. 40,210. N. Illinois, D. C. U. S. Term No. 656. The United States of America, et al., appellants, *vs.* J. M. Corrick and L. J. Keleher, a Partnership doing business as Adams, Corrick & Keleher, et al. Filed December 23, 1935. Term No. 656 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1936

FILED
DEC 23 1935
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 656

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA ET AL., APPELLANTS

v.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP, DOING BUSINESS AS ADAMS, CORRICK & KELEHER, ET AL.

STATEMENT AS TO JURISDICTION

In the District Court of the United States for the Northern District of Illinois, Eastern Division

In Equity No. 14900

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP doing business as Adams, Corrick, and Keleher, et al., petitioners and appellees

v.

UNITED STATES OF AMERICA, ET AL., DEFENDANTS and appellants

STATEMENT OF APPELLANTS PURSUANT TO THE PROVISIONS OF RULE 12 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES, SHOWING THAT THAT COURT HAS JURISDICTION TO REVIEW, UPON APPEAL, THE ORDER FOR INTERLOCUTORY INJUNCTION OF THE DISTRICT COURT

I

This suit arose upon petition and complaint of the livestock market agencies doing business at the Union Stock Yards, Chicago, Illinois, seeking to enjoin the United States of America, the Secretary of Agriculture, the Attorney General, and the United States District Attorney for the Northern District

of Illinois, Eastern Division, from enforcing or threatening to enforce the orders of the Secretary of Agriculture dated January 8, 1934, and March 12, 1934, respectively, in Bureau of Animal Industry Docket 402 (a proceeding under the Packers and Stockyards Act, 1921, 42 Stat. 159, U. S. C. A., Title 7, Chapter 9, Secs. 181–229), which orders prescribed maximum rates and charges for the services rendered by the petitioners at the stockyards; and from interfering or threatening to interfere with the collection of rates and charges specified in a schedule or tariff of rates published by petitioners October 19, 1935, to become effective November 1, 1935; and to enjoin and restrain the Secretary of Agriculture from suspending the registration of any of the petitioners because of the collection by such petitioners of the rates and charges contained in said schedule.

The orders of the Secretary of Agriculture dated January 8, 1934, and March 12, 1934, respectively, were attacked by these same petitioners in the case of *C. H. Acker, doing business as C. H. Acker & Co., et al.* v. *United States, et al.*, in Equity No. 13,829, in the District Court of the United States for the Northern District of Illinois, Eastern Division, and in that case the District Court on March 19, 1935, entered a final decree dismissing the petition filed therein. The petitioners in that case have taken an appeal to the Supreme Court.

In the instant case the petitioners sought to enjoin the enforcement of the same orders of the Secretary of Agriculture which were challenged in the *Acker* case upon the ground that said orders had as a matter of law been superseded by the schedule or tariff which petitioners published October 19, 1935.

Section 319 of the Packers and Stockyards Act (U. S. C. A., Title 7, Sec. 217) provides:

> *Proceedings for suspension of orders.* For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, sec. 316, 42 Stat. 168.)

The applicable provisions of the laws relating to the suspending or restraining the enforcement of orders of the Interstate Commerce Commission, also made applicable by the provision above quoted to the suspending or restraining of the enforcement of orders of the Secretary of Agriculture under the Packers and Stockyards Act, 1921, are found in United States Code, Title 28, Section 47

(Judicial Code, Section 24g, Oct. 22, 1913, c. 32, 38 Stat. 220), which provides for a hearing by a three-judge court upon an application for an interlocutory injunction to suspend or restrain the enforcement of orders of the Interstate Commerce Commission. It further provides:

> An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused.

United States Code, Title 28, Sec. 345 (Judicial Code, Sec. 238, as amended) provides that the Supreme Court shall have appellate jurisdiction over an interlocutory or final judgment or decree of a District Court as provided in Title 28, Sec. 47, referred to and quoted above.

II

The constitutionality of the provisions of the Packers and Stockyards Act, 1921, is not involved.

III

The date of the order for interlocutory injunction sought to be reviewed is December 3, 1935, and the date upon which the application for appeal was presented was December —. 1935.

IV

Under the provisions of the Packers and Stockyards Act, 1921, the Secretary of Agriculture has power to determine and prescribe just and reasonable rates or maximum or minimum rates for market agency services, as defined in the Act (U. S. C. A. Title 7, Sec. 211, c. 64, Sec. 310, 42 Stat. 166). Pursuant to that authority the Secretary entered an order January 8, 1934, prescribing maximum reasonable rates and charges for the services rendered by petitioners, and a supplemental order with respect thereto was entered on March 12, 1935. Both of these orders were upheld by a three-judge district court in an opinion filed February 1, 1935, in the case of *C. H. Acker, doing business as C. H. Acker & Co., et al.* v. *United States, et al.*, in Equity No. 13829, in the District Court for the Northern District of Illinois, Eastern Division. On March 19, 1935, a decree was entered dismissing the petition in that case. An appeal is being taken by the petitioners in that case to the Supreme Court. On October 19, 1935, the petitioners published a new rate schedule purporting to become effective November 1, 1935. The Secretary refused to file this schedule on the ground that it was not authorized by the Act in view of the orders which the Secretary had issued prescribing maximum rates lower than those contained in the schedule filed by petitioners. On October 31, 1935, the petition and com-

plaint in this case was filed seeking to enjoin the defendants from enforcing the orders of the Secretary which were upheld by the District Court in the *Acker* case, and further to enjoin the defendants from interfering or attempting to interfere with the collection of the rates contained in the schedule filed October 19, 1935, and further to enjoin the defendants from suspending the registration of any of the petitioners on account of their collection of the rates and charges contained in the filed schedule. On November 8, 1935, a hearing was held on petitioners' application for interlocutory injunction and on December 3, 1935, the Court entered an order for interlocutory injunction. The appellants pray for a reversal of that order on the ground that the findings of fact and conclusions of law and order for interlocutory injunction are based upon errors of law as more particularly set out in the Assignment of Errors filed herewith. Stated broadly, the appellants contend that the schedule of rates filed October 19, 1935, to be effective November 1, 1935, was unauthorized by the statute and that the same was null and void and did not have the effect of superseding the rates and charges contained in the orders of the Secretary of Agriculture, and that therefore the further enforcement of those orders should not have been enjoined.

V

The cases believed to sustain the jurisdiction of the Supreme Court of the United States are *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420; and *Stafford* v. *Wallace,* 258 U. S. 495, 512.

Respectfully submitted,

STANLEY REED,
Solicitor General.
JOHN DICKINSON,
Assistant Attorney General.
WENDELL BERGE,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1938

FILE COPY

FILED
MAR 23 1936
CHARLES ELMORE CROPLEY
CLERK

No. 656

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA ET AL., APPELLANTS

v.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP DOING BUSINESS AS ADAMS, CORRICK & KELEHER ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLANTS

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 656

UNITED STATES OF AMERICA ET AL., APPELLANTS

v.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP DOING BUSINESS AS ADAMS, CORRICK & KELEHER ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the specially constituted District Court (R. 23–24) is not reported.

JURISDICTION

The order for interlocutory injunction was entered by the District Court on December 3, 1935 (R. 28–30). Petition for appeal was filed December 18, 1935, and was allowed the same day (R. 32–33).

Section 316 of the Packers and Stockyards Act, c. 64, 42 Stat. 159, 168, provides that:

> * * * the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Act of June 18, 1910, c. 309, 36 Stat. 539, commonly known as the Commerce Court Act, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219 (U. S. C., Tit. 28, Secs. 41 (28), 47), transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all suits for interlocutory injunctions should be heard by three judges. Provision was made by the said Urgent Deficiencies Act for direct appeal to this Court from an order granting or denying an interlocutory injunction. (U. S. C., Tit. 28, Secs. 47, 345 (4).)

QUESTIONS PRESENTED

The general question presented is whether the specially constituted three-judge District Court erred as a matter of law in granting the order for an interlocutory injunction from which this appeal is taken. The specific questions presented are as follows:

(1) Whether the specially constituted three-judge District Court had jurisdiction to enter the order for an interlocutory injunction.

(2) Whether appellees can lawfully file and publish a schedule of rates higher than the maximum rates prescribed by the Secretary of Agriculture in orders which have been held by the District Court to be lawful, and whether such rates can lawfully be collected notwithstanding that they exceed the maximum rates prescribed in the orders.

(3) Whether the schedule of rates published by appellees on October 19, 1935, to become effective November 1, 1935, ever became the lawful and effective schedule, inasmuch as it was tendered to the Secretary of Agriculture, and was rejected and never actually filed by him.

STATUTES INVOLVED

The pertinent provisions of the Packers and Stockyards Act, 1921, and of the statutes relating to judicial review of the orders of the Secretary of Agriculture are set forth in the Appendix, *infra*, pages 43–52.

STATEMENT

Appellees in this case are market agencies engaged in the buying and selling of live stock on

a commission basis at the Union Stock Yards in Chicago, Illinois. With a few exceptions, they are the same persons who are appellants in *C. H. Acker et al.* v. *United States et al.*, No. 655 (R. 5, 6).

On October 31, 1935, appellees filed a petition in the District Court for the Northern District of Illinois, Eastern Division, the material allegations of which may be summarized as follows:

Appellees are market agencies registered with the Secretary of Agriculture under the Packers and Stockyards Act, 1921, and engaged in the buying and selling of livestock on a commission basis at the Union Stock Yards, Chicago, Illinois (R. 3–4). On January 8, 1934, the Secretary of Agriculture issued an order prescribing maximum reasonable rates to be charged by appellees for their services, and on March 12, 1934, a supplemental order slightly modifying the schedule of rates thus prescribed was issued (R. 5). Prior to the effective date of the orders some of appellees herein and others filed a petition and complaint entitled *C. H. Acker et al.* v. *United States et al.*, in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to enjoin the enforcement of the orders (R. 5). On April 19, 1934, an interlocutory injunction was issued in the *Acker* case upon the condition that the plaintiffs therein impound each month with the court the difference between the rates collected under the schedule then in effect and the amount

which would have been collected under the maximum rates prescribed in the orders (R. 5). Upon final hearing a decree was entered on March 19, 1935, dismissing the complaint and providing that if an appeal should be taken to this Court within thirty days, the interlocutory injunction theretofore entered should continue in effect until final disposition (R. 5–6). Such an appeal was prayed and allowed and a supersedeas was granted continuing the interlocutory injunction in force upon the same conditions with respect to impounding (R. 6).

On October 19, 1935, appellees published and submitted to the Secretary for filing a schedule of rates to become effective on November 1, 1935, superseding all previous schedules (R. 9). The Secretary refused to file the schedule thus submitted and returned it to appellees, upon the grounds that: (1) once he had prescribed a schedule of rates and charges for a particular market, no change in those rates and charges could be made except by him or by a court of competent jurisdiction in a proper proceeding; and (2) there was litigation pending involving the validity of the orders made by him (R. 9–11).

Appellees allege that it was the duty of the Secretary under the Packers and Stockyards Act, if he believed the rates specified in the schedule thus submitted to be unreasonable, to suspend the schedule and hold a hearing to determine that fact;

and that his refusal to retain and file the schedule was an arbitrary and unreasonable failure to perform his duty, and thus was a nugatory act (R. 11).

Appellees then allege that the schedule thus submitted became effective by operation of law on November 1, 1935, and that they are compelled under the provisions of the Packers and Stockyards Act to put it into effect, and if they fail to do so they are subject to penalties or forfeitures and severe fine or imprisonment (R. 11). On the other hand, they allege that the Secretary threatens to prosecute them for failure to obey his orders (R. 11–12). Thus they allege that they are in the dilemma of being required by the Act to put the schedule published by them into operation under the pain of fines, imprisonment, and forfeitures for failure to do so, but that they are being threatened by the Secretary with other fines and penalties if they put that schedule into effect (R. 12).

Appellees prayed that a three-judge court be convened (R. 12), and then further prayed (R. 13):

> That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the Orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402; and from interfering in any manner, civil or criminal, with the collection of rates and

> charges specified in the schedule or tariff attached as Exhibit A to this petition and complaint, and from threatening to interfere with the collection of the rates and charges specified in such schedule, and enjoining and restraining the Secretary of Agriculture from suspending the registration of any of the petitioners and plaintiffs because of his or its collection of the rates and charges in such schedule,—all until the further order of the Court * * *

A statutory three-judge court was convened (R. 23), and a hearing was held on the application for an interlocutory injunction (R. 25). The court rendered a *per curiam* opinion on November 19, 1935 (R. 23–24), and on December 3, 1935, it entered a statement, findings of fact, and conclusions of law (R. 24–28).

In its findings of fact the court adopted substantially the allegations of the petition concerning the entry of the orders by the Secretary, the hearing and ruling by the District Court on the validity of those orders in the case of *Acker* v. *United States*, 12 F. Supp. 776, the publication by appellees on October 19, 1935, of rates "in most instances materially higher than the rates and charges for such services as specified in" the orders of the Secretary (R. 26), the refusal of the Secretary to retain and file those rates, and the dilemma of appellees in being threatened with criminal and civil prosecution whether they

charged the rates prescribed in the Secretary's orders or those specified in the schedule submitted for filing (R. 25–27). It was further found that immediate and irreparable injury to the appellees would in all likelihood ensue unless an interlocutory injunction was ordered (R. 27).

The conclusions of law entered by the District Court may be summarized as follows:

(1) The Court has jurisdiction of the subject matter and of the parties (R. 27).

(2) Under the Packers and Stockyards Act the market agencies are the primary rate makers for their services (R. 27).

(3) The fact that the Secretary had entered an order fixing rates for such market agencies did not deprive them of the right thereafter to file new rates, which thereupon became the lawful rates subject to suspension and supersession by the Secretary as provided in the Packers and Stockyards Act (R. 27).

(4) The schedule submitted by appellees for filing was properly tendered and should have been filed by the Secretary (R. 27).

(5) The refusal of the Secretary to file the schedule submitted was unreasonable, arbitrary, and without authority of law (R. 27).

(6) "The filing in the office of the Secretary of Agriculture of a schedule of such rates lawfully tendered to him by the market agencies is a ministerial act; and he cannot, by arbitrarily refusing to

file the tendered schedule, render unlawful and ineffective a schedule of rates which, had it been filed, would have been the lawful schedule of rates and charges, unless thereafter suspended or superseded by the Secretary as provided by law" (R. 27–28).

(7) The fact that at the time of the tender of the schedule to the Secretary for filing there was pending before this Court an appeal from a decree of the same three-judge District Court which had held valid the orders of the Secretary did not deprive appellees of the right to initiate and file new rates, subject to suspension and supersession by the Secretary as provided in the Packers and Stockyards Act (R. 28).

(8) The schedule posted and tendered by appellees to the Secretary for filing became effective November 1, 1935, and from that date constituted the lawful rates of appellees, unless and until suspended or superseded by the Secretary (R. 28).

(9) Appellees in all likelihood will suffer irreparable injury unless an interlocutory injunction is granted (R. 28).

On December 3, 1935, the District Court entered an order for an interloctory injunction restraining appellants "from preventing or attempting to prevent, or from interfering with the plaintiffs and each of them in their several capacities as market agencies, from collecting, demanding, receiving, and retaining, the rates and charges for their market agency stockyards services at the

Union Stock Yards, in Chicago, Illinois, as they are fixed and prescribed by the schedule of rates and charges of plaintiffs which were tendered for filing to the Secretary of Agriculture October 19, 1935, to be effective November 1, 1935, a copy of which schedule is attached to the bill of complaint herein as Exhibit A thereof." It was further ordered that appellants "be restrained, until the further order of the court, from instituting, prosecuting, or aiding in instituting or prosecuting, any proceeding or action against the plaintiffs, or either or any of them, for the imposition or recovery of any penalties, fines, forfeitures, or imprisonment because of any demand for and collection of the rates and charges, or any of them, as in said schedule of rates and charges so effective November 1, 1935, is prescribed. And that the said Henry A. Wallace, Secretary of Agriculture, and any person or persons acting or assuming to act for or under him, be enjoined and restrained, until the further order of the court, from suspending the registration as market agencies of all or any of plaintiffs because of their, his, or its demand for, or collection of, the stockyards market agency rates and charges for services as prescribed and set forth in such schedule of rates and charges so effective November 1, 1935."

It was also ordered that, as a condition for the issuance of the injunction, appellees should file with the court a bond in the sum of $50,000, con-

ditioned that in the event it should ultimately be adjudicated that the schedule of rates and charges tendered to the Secretary on October 19, 1935, was not the lawful schedule of rates and charges, appellees should repay to those shippers from whom they had collected such rates and charges the amount by which those collections exceeded the rates and charges which would have been lawful except for the schedule so tendered (R. 29–30).

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In concluding that it had jurisdiction of the subject matter of this suit.

(2) In concluding as a matter of law that upon the record the schedule of rates as posted and as tendered for filing on October 19, 1935, to the Secretary of Agriculture became effective on November 1, 1935, and from that date constituted the lawful schedule of rates and charges for the market agency services of appellees, unless and until such schedule should be suspended by the Secretary, and in failing to find that such schedule of rates is null, void, and of no effect.

(3) In failing to find that after the Secretary of Agriculture has exercised his power to prescribe maximum rates and charges applicable to appellees, they have no lawful right to publish, file, or make effective a schedule of rates and charges which does not comply with the order of the Secretary.

(4) In concluding as a matter of law that the schedule of rates and charges which appellees on October 19, 1935, tendered to the Secretary of Agriculture for filing was properly tendered and should have been retained and filed in the office of the Secretary, and in concluding that the rejection by the Secretary of the schedule thus tendered was unreasonable, arbitrary, and without authority of law.

(5) In finding and concluding that immediate and irreparable injury and damage to appellees would in all likelihood ensue unless an interlocutory injunction be granted as prayed.

(6) In failing to find that appellees have an adequate remedy at law.

(7) In granting an interlocutory injunction and in entering the order for an interlocutory injunction.

SUMMARY OF ARGUMENT

I

The statutory three-judge District Court did not have jurisdiction of the subject matter of this case. Such a court has jurisdiction only over cases brought to enjoin, set aside, annul, or suspend an order of the Secretary of Agriculture. The allegations of the petition and complaint show that the purpose of this suit was to obtain an adjudication that the rate schedule tendered by appellees to the Secretary was valid and effective, and not to review, annul, or suspend the earlier orders of the

Secretary. The conclusions of law and the terms of the interlocutory injunction show that the court below regarded the suit as one brought to enjoin appellants from interfering with the collection of the rates specified in the schedule tendered by appellees to the Secretary. The lower court had no jurisdiction of an action brought to obtain relief from the refusal of the Secretary to file the tendered schedule. That refusal was not an *order,* and the court had jurisdiction only of actions to enjoin, set aside, annul, or suspend an *order*. Even if the action of the Secretary were an order, it could be nothing more than a negative order, and it is well settled that a statutory three-judge district court has no jurisdiction to review, annul, or suspend purely negative orders.

II

The schedule of rates tendered by appellees to the Secretary for filing contained rates which in most instances were higher than the maximum rates prescribed by the orders of the Secretary. Pursuant to the provisions of Section 310 of the Act, the orders of the Secretary provided that thereafter appellees should not publish, demand, or collect rates in excess of the maximum rates prescribed by the orders. The schedule tendered for filing, therefore, violated the orders of the Secretary, which have the force and effect of law. The provisions of Section 306 authorizing market agen-

cies to file schedules of rates upon their own motion do not authorize them to file rates which conflict with orders of the Secretary entered pursuant to Section 310. The statute in this regard is clear upon its face and there is no room or necessity for statutory construction. However, even if the language of the statute were ambiguous, the construction proposed by appellees should be rejected because of the absurd results to which it would lead. If appellees' construction were adopted, market agencies could harass and defeat the rate-making power of the Secretary by repeated and successive filings of new rate schedules in violation of orders made by the Secretary and upheld by the courts, thus forcing the Secretary to hold hearings on each of such new schedules. The rate-making power of the Secretary could not be effectively exercised if subject to such limitations.

III

The schedule of rates which appellees tendered to the Secretary on October 19, 1935, was returned by him and was not filed. Because it was not filed, the rates contained in it cannot be the legal and effective rates. Even if the court below were correct in its holding that the refusal of the Secretary to retain and file these rates was arbitrary, the appellees' remedy would be by mandamus.

ARGUMENT

I

THE COURT BELOW DID NOT HAVE JURISDICTION OF THE SUBJECT MATTER OF THIS CASE

This suit was brought in a statutory three-judge district court. The jurisdiction of the court is derived primarily from Section 316 of the Packers and Stockyards Act which provides that:

> * * * the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

Judicial review of the orders of the Interstate Commerce Commission was originally provided for by Section 1 of the Commerce Court Act, c. 309, 36 Stat. 539, which conferred jurisdiction upon the Commerce Court over "Cases brought to enjoin, set aside, annul, or suspend in whole or in part *any order* of the Interstate Commerce Commission." [Italics supplied.] The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, transferred the jurisdiction of the Commerce Court to the several District Courts of the United States, and provided that all such cases should be heard by three judges.

It is clear from these statutory provisions that a three-judge district court has jurisdiction only of

suits brought to enjoin, set aside, annul, or suspend an *order* of the Secretary of Agriculture.[1] The Government contends that this is not such a suit.[2]

The court below appears to have taken jurisdiction on the ground that this is a suit to enjoin, set aside, annul, or suspend in whole or in part the order made by the Secretary on January 8, 1934, and the order supplemental thereto made on March 12, 1934. The suit should not be so regarded. Its purpose was to prevent appellants from interfering with the collection by appellees of the rates and charges which they claim were lawfully established in the schedule or tariff which was tendered to the Secretary for filing and rejected by him, and which appellees claim became effective on November 1, 1935. This affirmatively appears from the

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[1] This Court has held that under these statutes a statutory three-judge district court has no jurisdiction to review the action of the Interstate Commerce Commission where no *order* has been made by the Commission. *United States* v. *Atlantic, B. & C. R. Co.*, 282 U. S. 522; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82.

[2] Objection to the jurisdiction of the court was not made below. Neither the statement of jurisdiction filed with this Court nor the assignment of errors expressly raises the question of the lower court's jurisdiction. It appears, however, that the limited jurisdiction of a statutory three-judge district court cannot be enlarged by the consent of the parties. See *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 18. Cf. *La Joya Grant* v. *Belen Land Grant*, 242 U. S. 595. This Court may raise the question of the lower court's jurisdiction of the subject matter on its own motion. *Stratton* v. *St. Louis Southwestern Ry. Co.*, 282 U. S. 10, 13; and see *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62–63; *Thomas* v. *Board of Trustees*, 195 U. S. 207, 211; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

allegations of the petition and complaint. Paragraph 4 thereof reads as follows:

> The petitioners and plaintiffs bring this action in equity against the defendants for the purpose of enjoining and restraining the defendants, and each of them, from interfering, civilly by suspension of the registration of the petitioners or by the exaction of penalties or forfeitures, or criminally by prosecution, with the publication, demands for, and collection of rates and charges lawfully established by the plaintiffs and petitioners in a schedule or tariff effective November 1, 1935 (R. 4).

A study of the allegations of the petition and complaint discloses that the purpose of the suit was to obtain an adjudication that the rate schedule tendered by appellees to the Secretary for filing was valid and effective.[3] It is true that the petition and complaint includes a prayer for an in-

[3] It is significant that in the brief submitted by appellees in the court below they clearly took the position that the suit was not brought to enjoin or set aside the earlier orders made by the Secretary. On page 14 of their brief, appellees stated:

> The independence of the instant suit from the suit of *Acker* v. *United States* is manifest. In the Acker suit, the plaintiffs contended that the rates prescribed by the Secretary were void because arbitrary and unreasonable. The instant suit has no relationship to the rates under question in the Acker suit. The question there was whether the rates prescribed were valid as of a specific time. The question in this suit is of the power of the Secretary to refuse himself to make, and to refuse to allow the market agencies to make, a new rate structure.

junction restraining appellants from enforcing or threatening to enforce the prior orders of the Secretary of Agriculture. But this prayer was merely ancillary to the primary relief sought, which was an injunction restraining interference with the collection of the rates and charges specified in the schedule which appellees claim became effective on November 1, 1935. Indeed, the fact that appellees had brought suit in the *Acker* case to review and set aside the earlier orders of the Secretary and that proceeding was still pending indicates that the instant suit was directed not at those orders but at the refusal of the Secretary to file the new schedule of rates tendered by appellees.

It appears from the conclusions of law and the terms of the interlocutory injunction that the court below regarded the suit as one to enjoin appellants from interfering with the collection of the rates specified in the schedule tendered by petitioners to the Secretary of Agriculture on October 19, 1935. The conclusions of law, which are found on pages 27 and 28 of the record, are directed to the issue of whether appellees had the right to initiate and file rates and whether the schedule of rates tendered to the Secretary of Agriculture for filing became effective on November 1, 1935, and from that date constituted the lawful rates and charges. The relevant provisions of the interlocutory injunction entered by the court below follow:

> It is therefore ordered by the court That a writ of injunction issue out of and under

the seal of this court restraining and enjoining, until the further order of this court, the defendants, Henry A. Wallace, Secretary of Agriculture, Homer S. Cummings, Attorney General, and Michael Igoe, United States District Attorney for the Northern District of Illinois, and all the officers, attorneys, solicitors, agents, and representatives of the United States, and all other persons acting or claiming or assuming to act for and under the authority of the defendants, or any of them, from preventing or attempting to prevent, or from interfering with the plaintiffs and each of them in their several capacities as market agencies, from collecting, demanding, receiving, and retaining, the rates and charges for their market agency stockyards services at the Union Stock Yards, in Chicago, Illinois, as they are fixed and prescribed by the schedule of rates and charges of plaintiffs which were tendered for filing to the Secretary of Agriculture October 19, 1935, to be effective November 1, 1935, a copy of which schedule is attached to the bill of complaint herein as Exhibit A thereof. And that each and all of such persons be restrained, until the further order of the court, from instituting, prosecuting, or aiding in instituting or prosecuting, any proceeding or action against the plaintiffs, or either or any of them, for the imposition or recovery of any penalties, fines, forfeitures, or imprisonment because of any demand for and collection of the rates and charges, or any of them, as in

> said schedule of rates and charges so effective November 1, 1935, is prescribed. And that the said Henry A. Wallace, Secretary of Agriculture, and any person or persons acting or assuming to act for or under him, be enjoined and restrained, until the further order of the court, from suspending the registration as market agencies of all or any of plaintiffs because of their, his; or its demand for, or collection of, the stockyards market agency rates and charges for services as prescribed and set forth in such schedule of rates and charges so effective November 1, 1935. (R. 29.)

It is significant that this injunction on its face does not purport to enjoin, set aside, or annul or suspend in whole or in part the prior orders made by the Secretary, but merely restrains appellants from interfering with the collection of the charges set out in the tariff schedule tendered by appellees to the Secretary of Agriculture.

It is equally clear that the lower court had no jurisdiction of an action brought to obtain relief from the refusal of the Secretary of Agriculture to file the tariff schedule tendered to him by appellees. The court has jurisdiction only of actions to enjoin, set aside, annul, or suspend *an order* of the Secretary, and the refusal of the Secretary to file the schedule tendered by appellees was not an order in any sense. This refusal had none of the formal requisites of an order, nor was it the result of any formal administrative procedure. It was merely

an informal refusal made in response to an informal request to take affirmative action desired by appellees.

Even if the action of the Secretary of Agriculture should be regarded as an order, however, it can be nothing more than a negative order which denies affirmative relief. It is well settled by decisions of this Court with respect to orders made by the Interstate Commerce Commission that a statutory three-judge court has no jurisdiction to review, annul, or suspend purely negative orders which deny affirmative relief. *Procter & Gamble Co.* v. *United States,* 225 U. S. 282; *Hooker* v. *Knapp,* 225 U. S. 302; *Lehigh Valley R. R. Co.* v. *United States,* 243 U. S. 412; *Piedmont & Northern Ry. Co.* v. *United States,* 280 U. S. 469; *Standard Oil Co.* v. *United States,* 283 U. S. 235; *United States ex rel Chicago Great Western R. R. Co.* v. *Interstate Commerce Commission,* 294 U. S. 50, 61–62. The reason for this rule was stated by this Court in *Standard Oil Co.* v. *United States,* 283 U. S. 235, 238, in these words:

> A negative order which denies relief without more * * * contemplates no action susceptible of being stayed by an injunction or affected by a decree setting aside, annulling, or suspending the order.

If it is true, as contended by appellees and as found by the District Court, that the Secretary was under a ministerial duty to file the schedule of rates tendered by appellees, the proper remedy for ap-

pellees to have pursued was a suit at law for a writ of mandamus directing the Secretary to perform that duty. The refusal of the Secretary to perform an alleged ministerial duty does not confer jurisdiction upon a court which has power to review only *orders* made by the Secretary.

II

THE SCHEDULE OF RATES PUBLISHED BY APPELLEES ON OCTOBER 19, 1935, TO BE EFFECTIVE NOVEMBER 1, 1935, IS ILLEGAL AND VOID TO THE EXTENT THAT IT CONTAINS RATES IN EXCESS OF THE MAXIMUM RATES PRESCRIBED BY ORDER OF THE SECRETARY ENTERED JANUARY 8, 1935, AS OF MARCH 12, 1934

The District Court found that the schedule of rates published and tendered for filing by appellees on October 19, 1935, contained rates which were in most instances higher than those provided in the orders of the Secretary (R. 26). Nevertheless, the court concluded that since those rates were not suspended by the Secretary, they became effective on November 1, 1935, the date designated in the schedule as the effective date (R. 28).

The construction which the District Court thus placed upon the provisions of Title III of the Packers and Stockyards Act amounts to this: even though the Secretary of Agriculture has entered an order prescribing maximum rates, and has provided in that order that thereafter appellees shall not publish, demand, or collect any rate or charge in excess of that prescribed in the order, nevertheless appellees at any time thereafter may file a new schedule specifying rates higher than the maximum

rates prescribed by the Secretary, and by so doing may force the Secretary to hold a new hearing on the lawfulness of the schedule of rates filed or else those rates will become effective notwithstanding that they contravene the order. Under this construction, stockyard owners or market agencies may effectively nullify the rate-making power conferred upon the Secretary of Agriculture by successively forcing new hearings through the repeated filing of new rate schedules which violate lawful rate orders.

Although the Act provides for judicial review of orders of the Secretary through application to a three-judge district court for an injunction, thus clearly indicating the intention of Congress that unlawful rate orders should be set aside through the orderly process of judicial review, the construction of the Act adopted by the District Court herein would in effect provide a short cut, not intended by Congress, for those desirous of avoiding the operation of the Secretary's rate orders. Instead of requiring application for judicial review of orders thought to be unlawful, the decision of the District Court permits nullification of such orders by the simple expedient of filing a schedule which violates them. Even though the Secretary could suspend the operation of such a schedule for 60 days for the purpose of holding a new hearing, and even though after such a hearing the Secretary might again reaffirm the rates he had previously

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prescribed, repeated and successive filings of new tariffs violative of such prescribed rates could obviously wear down and defeat the rate-making authority.

The record in the *Acker* case demonstrates the mass of detail involved in the task of determining just and reasonable rates for market agency services in fulfillment of the duty imposed upon the Secretary by Section 310 of the Packers and Stockyards Act. The extensive cost studies made necessary by the great number of market agencies doing business at a large stockyard, such as the one at Chicago, and the voluminous evidence with respect to the general business conditions at such a stockyard, require careful analysis and study by the rate-making authority. Although the proper analysis of this evidence frequently consumes considerable time, it is nevertheless a task which must be thoroughly done. Under the construction of the Act adopted by the District Court, notwithstanding the care which may have been exercised in the preparation of an order, market agencies subject to it may, immediately after its entry or coincident with its effective date, file new rates which violate the order and thereby force the Secretary into a new hearing. This may be done without making any attempt at all to challenge the order upon its merits through judicial review.

Not only does the construction adopted by the District Court permit nullification of orders con-

cerning whose reasonableness there may be justifiable doubt, but even orders which have been judicially upheld are rendered vulnerable. Orders which have been judicially approved in proceedings duly brought to enjoin enforcement may, according to the decision below, be nullified by the market agencies through filing a schedule containing rates which violate the orders.

In the instant controversy, the District Court had held the orders of the Secretary valid in the *Acker* case, and had dismissed the petition which had been filed in that case by most of appellees in the present case. The orders upheld in the *Acker* case contained provisions that on or after the effective date the market agencies subject thereto were forbidden to "publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service." Notwithstanding the adjudication of the District Court that the Secretary's orders challenged in the *Acker* case were valid, appellees on October 19, 1935, approximately seven months after that adjudication and while an appeal was pending, published a schedule containing rates which exceeded the maximum rates prescribed in those orders. According to the decision of the District Court in the instant case, those rates became effective on November 1, 1935, because they were not

suspended by the Secretary. That decision was based solely upon the ground that the language of the Act conferred upon appellees the right thus to nullify and defeat the power of the Secretary to determine fair and reasonable rates, and was made without any showing or finding that there had been any change in economic conditions rendering the prescribed maximum rates unreasonable.

As will hereafter be shown, the words of the Act furnish no basis whatsoever for such a construction. But even if the meaning of the words were ambiguous, the Court should attempt to avoid, if possible, a construction which results in such absurd consequences as those which follow from the decision of the District Court. It is well settled that whenever possible statutes will be construed to avoid absurd and impracticable consequences. See *Church of the Holy Trinity* v. *United States,* 143 U. S. 457, 458–459; *United States* v. *Kirby,* 7 Wall. 482, 486–487; *United States* v. *Katz,* 271 U. S. 354, 357; *Sorrells* v. *United States,* 287 U. S. 435, 446.

But resort to this canon of construction is unnecessary. The language of the Act is clear and unequivocal, and on its face demands rejection of the construction adopted by the District Court.

In the court below appellees relied upon Section 306 (c) of the Act which provides: "No changes shall be made in the rates or charges *so filed and published,* except after ten days' notice to the Secretary and to the public filed and published as

aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect * * *." [Italics supplied.] The words *so filed and published* must refer to rates filed pursuant to authority granted by some preceding provision of Section 306. They cannot refer to rates fixed by the Secretary in the exercise of the rate-making power conferred upon him by the Act, because the grant of such power to the Secretary is made in the subsequent provisions of Section 310.

The only provision preceding Section 306 (c) which in any way concerns the fixing of rates is that contained in Section 306 (a), wherein it is provided that within sixty days after the Secretary has given notice that a stockyard comes within the terms of the Act, every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all the rates and charges for the services furnished by such agency. Subsections (a) and (c) of Section 306 relate primarily to the procedure for filing rates by market agencies themselves in the absence of action by the Secretary. Section 306 (a), by requiring the filing of rates by market agencies within sixty days after notice has been given that a stockyard comes within the terms of the Act, provides a means for the orderly posting of tariffs and the filing of rates by market agencies themselves, so that business may be con-

ducted in an orderly fashion irrespective of whether the Secretary ever exercises his rate-making powers. The changes in rates which Section 306 (c) authorizes the market agencies to make themselves relate to changes in rates and charges filed and published as provided in Section 306 (a). Section 306 does not purport to provide a means for setting aside or superseding orders of the Secretary.

The provisions of other Sections of the Act lend further support to this reading of the language of Section 306 (c). Thus, Section 310 (a), which empowers the Secretary to prescribe rates, provides that he "May determine and prescribe what will be the just and reasonable rate or charge * * * *to be thereafter observed* * * *." [Italics supplied.] Section 310 (b) provides that the Secretary shall have the power to make an order that an operator[4] in a stockyard "*shall not thereafter publish, demand, or collect* any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum * * * so prescribed * * *." [Italics supplied.] It should be noted in this connection that in the orders made by the Secretary on January 8, 1934, and March 12, 1934, it was expressly provided, as this Section author-

[4] The word "operator" as used in this Section has been held by this Court to include market agencies. *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420.

izes, that appellees should not publish, demand, or collect any rates or charges in excess of those prescribed therein. In addition, Section 313 of the Act provides that, except as otherwise provided in the Act, all orders of the Secretary, other than orders for the payment of money, shall take effect at the time stated in the order, "and *shall continue in force until his further order*, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction."[5] [Italics supplied.]

Thus the Act provides that once the Secretary prescribes a maximum reasonable rate it is "to be thereafter observed," "it shall continue in force until his further order," and the market agency "shall not thereafter publish, demand, or collect any rate * * * in excess of the maxi-

[5] It is clear that the interlocutory injunction entered by the District Court pending the appeal in the *Acker* case did not suspend the prior orders of the Secretary within the meaning of Section 313. On the contrary, those orders were upheld by the District Court. The interlocutory injunction was granted by consent and upon condition that appellees impound with the Clerk of the Court the difference between the charges collected under the former schedule of rates and the amount which would have been collected under the rates prescribed in the orders of the Secretary. Thus, if the decision of the District Court is affirmed on appeal, there will never have been a moment of time subsequent to the effective date named in the orders during which the orders of the Secretary will not have been effective.

mum so prescribed." These express provisions of the Act plainly deny to appellees the right to tender for filing a schedule specifying rates higher than the maximum rates prescribed in orders theretofore made by the Secretary, and whose validity is under attack in proceedings which are still pending. In these circumstances the Secretary acted properly in rejecting and refusing to file the schedule of rates tendered by appellees.

A consideration of the nature of the function of the Secretary in prescribing maximum reasonable rates will lend further support to this contention. It is clear that in prescribing rates he is acting in a legislative, or quasi-legislative capacity. See *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210, 226; *Baer Bros.* v. *Denver & Rio Grande R. R. Co.,* 233 U. S. 479, 486; *Terminal Railroad Assn.* v. *United States,* 266 U. S. 17, 30; *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.,* 284 U. S. 370, 386, 388. An order of the Secretary may be challenged in appropriate legal proceedings at any time, but it would seem clear that no person should be able to render nugatory the legislative action of the Secretary, or force him to legislate again, without any determination as to the validity of his first legislative action, any more than could be done in the case of an act of Congress.

Appellants do not contend that once the Secretary has made an order prescribing maximum rea-

sonable rates, appellees are precluded forever afterward from making any attack upon those rates. Appellants urge only that appellees cannot overthrow the orders of the Secretary by the method they have pursued here. Ample opportunity for review and modification of the Secretary's orders is provided by the Act. Under Section 316 market agencies are given the right to obtain review of the Secretary's orders and to have them annulled or set aside if they are invalid. That was the procedure followed by appellees in the *Acker* case.

Moreover, if subsequent to the effective date of an order of the Secretary, and even after the validity of such an order has been judicially upheld, conditions should so change that the rates prescribed are no longer reasonable, there are appropriate remedies available both administratively and in the courts. It is not to be doubted that in case of substantial change in economic conditions subsequent to the effective date of an order, the road is open to a rehearing before the Secretary at the motion of the market agencies. The Secretary retains jurisdiction over his orders and has power to change them at any time in the future.

The power of the Secretary to make such changes in his orders is expressly recognized in Section 313 of the Act. There it is stated that, except as otherwise provided in the Act, all orders of the Secretary, other than those for the payment of money, shall take effect at the time stated in the order,

"and *shall continue in force until his further order,* or for a specified period of time, according as is prescribed in the order, *unless such order is suspended or modified or set aside by the Secretary* or is suspended or set aside by a court of competent jurisdiction." [Italics supplied.] Thus the Secretary is expressly granted the power to suspend, modify, or set aside his own orders, and can change a prior order by a subsequent one. It appears, therefore, that this Section recognizes the right of market agencies to obtain a rehearing before the Secretary in a proper case. And it is clear that if the Secretary improperly denies a petition for rehearing, resort may be had to the courts. See *Atchison, Topeka & Santa Fe Ry. Co.,* v. *United States,* 284 U. S. 248; *United States* v. *Northern Pacific Ry. Co.,* 288 U. S. 490.

Furthermore, this Court has expressly recognized the fact that the Secretary has the power to grant a rehearing. In the case of *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, it was said (at pp. 444–445):

> Where it is believed that the Secretary erred in his findings because important evidence was not brought to his attention, the appropriate remedy is to apply for a rehearing before him or to institute new proceedings. He has the power and the duty to modify his order, if new evidence warrants the change. Compare *Interstate Commerce Commission* v. *Union Pacific R. R. Co.,*

222 U. S. 541, 550. A rate order is not *res judicata.* Every rate order made may be superseded by another.

It is important to note in this connection that the Secretary has in the past always recognized the right of those affected by his rate orders to seek a rehearing. Where he has been of the opinion that the circumstances warranted it, he has granted such a rehearing. See *Morgan* v. *United States,* 8 F. Supp. 766, 768. In other cases, where he has been of the opinion that there was no showing of changed conditions warranting a new order, he has denied the request for rehearing. See *Union Stock Yards Co. of Omaha* v. *United States,* 9 F. Supp. 864, 866–867; *St. Joseph Stock Yards Co.* v. *United States,* 11 F. Supp. 322, 324; *American Commission Co.* v. *United States,* 11 F. Supp. 965, 966. Never has he denied such a request on the ground that he had no power under the Act to grant it; and if a request were improperly denied on such ground, or upon other grounds, parties affected could then resort to their remedy in court.

It is also to be noted that appellees themselves have recognized the right of the Secretary to grant a rehearing. Thus, in their petition in this case, it is alleged in Paragraph 7 (R. 5) that a petition for rehearing was made by them prior to the entering of the supplemental order of March 12, 1934, and denied by the Secretary. And it is further alleged that on April 9, 1934, an amended petition for re-

hearing was filed and that it was denied on April 12, 1934, before the institution of the suit in the *Acker* case. However, no such petition for rehearing was ever made thereafter. It would appear then that appellees were aware of their remedy through a rehearing, but that they attempted to circumvent that procedure by the means adopted herein.

It is submitted, therefore, that a complete remedy was available to appellees upon a showing that because of changed conditions the rates prescribed by the Secretary were no longer the reasonable and lawful rates. Such a showing was absolutely necessary before they had any right to obtain relief from the Secretary's orders. See *United States* v. *Northern Pacific Ry. Co.*, 288 U. S. 490. Appellees have attempted to evade that requirement by adopting the procedure in question herein. By such means they attempt to procure a ruling that despite the fact that the orders of the Secretary prescribing lawful rates have been upheld by the District Court, and without regard to the decision which this Court may reach concerning the validity of those orders, the rates submitted by appellees for filing are now the legal rates, even though there has been no showing, or finding, that those rates are reasonable and lawful. Such a procedure is in defiance of the express provisions of the Act, is disruptive of sound administrative practice, and leads to absurd results—results which reduce the rate-making power of the Secretary to a nullity.

III

THE SCHEDULE OF RATES PUBLISHED BY APPELLEES OCTOBER 19, 1935, WAS NEVER LEGAL AND EFFECTIVE, SINCE AS A MATTER OF LAW IT WAS NEVER FILED

Appellees allege that they "duly prepared, published, and submitted to the Secretary for filing" a new schedule of rates suspending all previous rates (par. 13 of pet.; R. 9), but that he "refused to retain the proposed new schedule of rates and charges" (par. 14 of pet.; R. 9). Appellees further allege that the Secretary's refusal to retain and file the schedule was arbitrary and unreasonable and therefore void and of no effect (par. 15 of pet.; R. 11), and that the schedule of rates thus submitted for filing became the legal and effective rates by operation of law (par. 17 of pet.; R. 11).

It has already been demonstrated that the Secretary properly rejected the schedule submitted by petitioners. *Supra,* pp. 22–34. Appellants further contend that aside from the question of whether the Secretary acted properly in rejecting and refusing to file the rates, those rates cannot under the statute become effective since they were never actually *filed* by the Secretary.

The Act expressly provides that new schedules of rates must be *filed* before they can become effective. Section 306 (c) provides that "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Sec-

retary and to the public *filed* and published as aforesaid * * *." [Italics supplied.] Section 306 (e) provides that "Whenever there is *filed* with the Secretary any schedule, stating a new rate or charge" [italics supplied] the Secretary may enter upon a hearing concerning the lawfulness of the rate or charge. Section 306 (f) provides that no market agency shall "charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules *filed* and in effect at the time * * *." [Italics supplied.] It is submitted that the rates which appellees contend in this proceeding are the legal rates were *submitted for filing,* but were never actually *filed* so as to come within the requirements of the above Sections of the Act.

There is a vast difference between *submitting for filing* and actually *filing.* The *submitting or tendering for filing* is an act of the market agency. The actual *filing* is an act of the Secretary—the actual retention of and placing on file the rates submitted to him. Appellees recognized this distinction in the allegations of their petition referred to above. The District Court clearly recognized the distinction throughout its opinion, findings of fact, and conclusions of law (R. 23–28), wherein it continually referred to appellees' act as that of *submitting the rates for filing,* and to the Secretary's act as a *refusal to file.* Nevertheless, appellees contended, and the District Court concluded,

that those rates became the legal rates despite the fact that they were never actually *filed.*

The Act itself also clearly recognizes a distinction between *submitting for filing* and *filing.* Thus, Section 306 (d) provides that: "The Secretary *may reject and refuse to file* any schedule *tendered for filing* which does not provide and give notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful." [Italics supplied.] If the tendering for filing could be considered tantamount to actual filing, this Section could never operate effectively.

A consideration of the purpose of the requirement that rates be filed before they can become effective will demonstrate conclusively that the word "filed", as used in the Packers and Stockyards Act, means an actual retention and placing on file of the schedule by the Secretary. That purpose is twofold: first, so that the public may have a means of determining what the legal rates at any particular time are; and, second, so that the public and the administrative officials charged with the duty of enforcing the Act may know whether a particular market agency is abiding by the legal rates. If market agencies were to be permitted to make changes in their rates without the necessity of such changes being actually kept on file with the Secretary, the entire purpose of the Act would be defeated. The public would never know whether or not the market agencies were overcharging for their

services, and the administrative officials would be unable to enforce compliance with the Act, since they would never know whether the legal rates were being charged or not. At the very heart of the Act is the requirement that rates to be effective must actually be *on file* with the Secretary.

The decided cases clearly support the view that there is a distinction between a *tendering for filing* and the actual *filing,* and that the latter term connotes an actual retention and keeping on file by the public officials. Thus, this Court in *United States* v. *Lombardo,* 241 U. S. 73, 76, quoted with approval the language of the lower court, whose judgment it affirmed, as follows (at p. 76):

> The word "file" is derived from the Latin word *"filum,"* and relates to the ancient practice of placing papers on a thread or wire for safe keeping and ready reference. Filing, it must be observed, is not complete until the document is delivered and received. "Shall file" means to deliver to the office and not send through the United States mails. *Gates* v. *State,* 128 N. Y. Court of Appeals, 221. *A paper is filed when it is delivered to the proper official and by him received and filed.* [Italics supplied.]

And in the case of *United States* v. *Van Duzee,* 185 U. S. 278, this Court recognized a distinction between the word "deposit" and the word "filing." See also *United States* v. *Davidson,* 285 Fed. 661 (E. D. Pa.).

Various pronouncements on the question of what constitutes a filing have been made in the lower Federal courts. In *Edward Sales Co.* v. *Harris Structural Steel Co.*, 17 F. (2d) 155, 158–159 (D. Maine) it was said:

> It would seem that some action on the part of the receiving official is necessary, or at least an intention on his part to treat the paper as similar papers are treated in the regular routine of his office.
>
> Here both elements are lacking. The regular course of filing was interrupted. The progress of the paper was stopped at the door of the secretary's office; nor did he have any intention of filing it when received, as he had been warned by the maker not to do so. He has refused to file it. He has consistently tried to leave the rights of the parties where they were before the mail arrived that morning. On the advice of the Attorney General he has refused, quite properly, to give the paper to either party till this litigation ceases.
>
> Under the circumstances, I cannot hold that the rights of the parties were other than they would have been, had the power of attorney not been mailed to Augusta by Mr. Merrill.

In *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2d) 972, 974 (Ct. of App. of D. of C.) it was stated:

> "In the sense of a statute requiring the filing of a paper or document, it is filed when delivered to and received by the proper officer

> to be kept on file. The word carries with it the idea of permanent preservation of the thing so delivered and received; that it may become a part of the public record. It is not synonymous with deposited; People v. Peck, 67 Hun. 560, 22 N. Y. S. 576." 2 Bouv. Law Dict. 1219, "File."

In *In Re Gubelman,* 10 F. (2d) 926, 929 (C. C. A. 2d), it was said:

> The word "filed" has not been defined by Congress. It has, however, a well-defined meaning. It signifies the delivery into the actual custody of the proper officer, designated by the statute, and whose duty it is to keep the records of the court. It carries with it the idea of permanent preservation of the thing as a public record. A paper is not filed by presenting it to the judge. He has no office in which papers are filed and permanently preserved. A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case.

~~See also *Pacific Telephone & Telegraph Co.* v. *Agnew*, 2 F. (2d) 155 (W. D. Wash.); *Mutual Life Ins. Co. v. Phinney*, 76 Fed. 617 (C. C. A. 9th).~~

It appears to be the general rule in the State courts that a mere tendering of a paper to a public official followed by a withdrawal of the paper does not satisfy a statutory requirement that the paper be filed. *Chapin* v. *Kingsbury,* 135 Mass. 580; *The*

State v. *Chicago and Eastern Illinois R. R. Co.*, 145 Ind. 229; *Nations* v. *Lowenstern*, 27 N. M. 613.

See also *Albany Builders' Supply Co.* v. *Eastern Bridge and Structural Co.*, 235 N. Y. 432, 437; *Meridian National Bank* v. *Hoyt & Bros. Co.*, 74 Miss. 221, 228; *Bergeron* v. *Hobbs*, 96 Wis. 641, 643; *Medland* v. *Linton*, 60 Neb. 249, 255–256.

Appellants submit that the Secretary properly rejected and refused to file the schedule of rates submitted to him by appellees. However, if as contended by appellees, and as found by the District Court, the Secretary acted improperly in rejecting that schedule, it is submitted that the remedy sought by appellees herein was not the proper one. If, as concluded by the District Court, the act of filing by the Secretary is a ministerial act, it would seem that the proper remedy for appellees would have been a suit at law to procure a writ of mandamus directing the Secretary to file the rates submitted. In such a suit the question of whether it was his duty to file those rates, even though they were higher than the ones prescribed in his orders, could have been determined. It is submitted, however, that appellees had no right to seek a declaration from a three-judge district court to the effect that the rates submitted became effective by operation of law even though they were never actually filed, and to ask that an injunction be issued enjoining interference with the collection of those rates. And it is further submitted that

the District Court erred in concluding that the rates submitted became effective on November 1, 1935, despite the fact that they were never actually filed, and in issuing an injunction as prayed.

CONCLUSION

It is respectfully submitted that the decree of the District Court should be reversed and set aside with directions to dismiss the petition and complaint filed herein.

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MARCH 1936.

APPENDIX

Title III of the Packers and Stockyards Act, 1921, c. 64, 42 Stat. 159, 163–168, as amended May 5, 1926, c. 240, 44 Stat. 397 (U. S. C. Tit. 7, Secs. 201, *et seq.*), provides, in part, as follows:

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of livestock;

(c) The term "market agency" means any person engaged in a business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their

appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling livestock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered

in a civil action brought by the United States.

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard: *Provided,* That in any State where the weighing of livestock at a stockyard is conducted by a duly authorized department or agency of the State, the Secretary, upon application of such department or agency, may register it as a market agency for the weighing of livestock received in such stockyard, and upon such registration such department or agency and the members thereof shall be amenable to all the requirements of this Act; and upon failure of such department or agency or the members thereof to comply with the orders of the Secretary under this Act he is authorized to revoke the registration of such department or agency and to enforce such revocation as provided in section 315 of this Act.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the

stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished

at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

* * * * *

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

* * * * *

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the re-

covery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

* * * * *

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

The Act of June 18, 1910, c. 309, 36 Stat. 539, popularly known as the Commerce Court Act, provided, in part, as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a court of the United States is hereby created which shall be known as the commerce court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

First. All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

Second. Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

Third. Such cases as by section three of the Act entitled "An Act to further regulate

commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

Fourth. All such mandamus proceedings as under the provisions of section twenty or section twenty-three of the Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

* * * * *

SEC. 2. * * * An appeal may also be taken to the Supreme Court of the United States from an interlocutory order or decree of the commerce court granting or continuing an injunction restraining the enforcement of an order of the Interstate Commerce Commission, provided such appeal be taken within thirty days from the entry of such order or decree.

The Urgent Deficiencies Appropriation Act of October 22, 1913, c. 32, 38 Stat. 208, 219, provided, in part, as follows:

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred

to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed.

* * * * *

No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. * * * An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 656

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

J. M. CORRICK AND L. J. KELEHER, A PARTNERSHIP DOING BUSINESS AS ADAMS, CORRICK & KELEHER, ET AL.,
Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEES.

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Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEES.

OPINION BELOW.

The opinion of the statutory court (R. 23-24) is not reported. The Findings of Fact and Conclusions of Law of the specially constituted court appear in the record at pages 24-28.

JURISDICTION.

The order for interlocutory injunction was entered December 3, 1935 (R. 28-30). Petition for appeal was allowed December 18, 1935 (R. 32-33). A direct appeal is allowed to the Supreme Court by Section 47, Title 28 U. S. Code, a part of the Urgent Deficiencies Appropriation Act of October 22, 1913 c. 32, 38 Stat. at L. 208, 219.

QUESTIONS PRESENTED.

The questions presented are:

1. Whether under the Packers and Stockyards Act, market agencies have the power and right to initiate rates subject to the regulatory power of the Secretary of Agriculture.

2. Whether upon the filing of a new schedule of rates with the Secretary of Agriculture and his refusal to retain it but without suspending the operation of the schedule and instead insisting upon the enforcement of a prior rate order and threatening prosecution for violation of such order, a Statutory Court, having jurisdiction over the parties, has jurisdiction to entertain a suit to restrain the Secretary from enforcing the order with which he demands compliance.

3. Whether an administrative officer has the power to refuse to retain a paper duly delivered to and filed with him and then assert that the document can be of no effect because it was not filed.

The Government below did not question the filing of the schedule of October 19, 1935 nor do the assignments of errors raise the question of fact of filing. Out of an

abundance of caution, however, this brief will discuss the question.

STATUTES INVOLVED.

The statutes involved are the Packers and Stockyards Act, 1921, and those statutes relating to the jurisdiction of the Statutory Court and this Court. The Packers and Stockyards Act is set forth herein as Appendix B. The provisions of law relating to jurisdiction and appeal are set forth herein as Appendix C.

STATEMENT OF THE CASE.

The appellees are market agencies engaged in the buying and selling of live stock on a commission basis at the Union Stock Yards in Chicago. They are, with few exceptions, the same persons who are appellants in *C. H. Acker, et al.*, v. *United States, et al.*, No. 655 (R. 5, 6).

On January 8, 1934, the Secretary of Agriculture entered a rate order for the Chicago market (R. 5). This order was entered pursuant to a hearing had in 1933 upon an investigation of costs, volume of business and receipts for the years 1931 and 1932 (R. 6). After the denial of a petition for rehearing, the schedule of rates and charges of the January 8 order was slightly modified by an order entered March 12, 1934 (R. 5). On April 9, 1934, a second petition for rehearing was filed which was denied three days later (R. 5).

The market agencies then sought judicial review in the case of *C. H. Acker, et al.* v. *United States of America, et al.*, now No. 655, October Term, 1935, in this court (R. 5). In that suit the District Court ordered a preliminary injunction on April 19, 1934. On final hearing, the court below dismissed the complaint and allowed an appeal to this court (R. 5).

The petition alleges that subsequent to 1931 and 1932, the years investigated, subsequent to the orders of the Secretary, and subsequent to the hearing and decree in the District Court, the receipts of live stock of the appellee decreased in volume until, for example, during August, 1935, the receipts were the lowest of any August since the year 1882 (R. 6). It is further alleged that changed economic conditions, decrease in volume of live stock, and decreased volume of receipts had caused such losses and

hardship that the appellees filed and, published a new schedule of rates effective November 1, 1935 (R. 6).

It is contended that the provisions of the Packers and Stockyards Act authorize market agencies to initiate a new rate schedule or structure by filing and posting such schedule in compliance with the terms of the Act, and that when such schedule is filed and posted in advance of its effective date, the rates in such schedule become effective upon the day indicated in the schedule, unless the Secretary, in the meantime, suspends the proposed schedule for a limited period of time, upon assigning a reason for such suspension, in order that a full hearing and determination may be had of the reasonableness of the rates and charges contained in the schedule (R. 8, 9).

Before the schedule in question herein was filed, the appellee by their representative had conferred with the Department of Agriculture and were informed that the Department was sympathetic with the condition of the commission men and their business but that nothing could be done because litigation was pending (the *Acker* case) to determine the validity of the orders of the Secretary of January 8, 1934 and March 12, 1934. (R. 6, 7, 8, letters of September 23, 1935 and September 30, 1935).

The Department of Agriculture stated

> "that the commission rate situation at the Chicago market should not be disturbed pending the determination of the suit brought by the market agencies to test the validity of the Secretary's order prescribing reasonable rates and charges for their services at that market" (R. 8).

Being unable to obtain administrative relief, the appellees prepared, posted, published, and delivered to the Secretary of Agriculture a new schedule of rates superseding previous tariffs, the schedule bearing publication date October 19, 1935, and the effective date of November 1, 1935

(R. 9). The schedule in question appears as Exhibit A to the petition (R. 13).

The delivery of the schedule in question to the Secretary of Agriculture was acknowledged by him by letter dated October 26, 1935. In this letter the Secretary called attention to his orders of January 8, 1934 and March 12, 1934 in Bureau of Animal Industry Docket No. 402; to the petitions for rehearing which had been filed and denied; and to the severe penalties for violation of his orders. The letter then states:

> "The Secretary will insist upon compliance with his orders" (R. 10).

The schedule which had been delivered to the Department of Agriculture was returned with the letter of October 26, 1935 with the following comments:

> "The Department administratively construes the Packers and Stockyards Act, 1921, to mean that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding. The mere proffer to file a new schedule of different rates and charges does not require the Secretary to receive and file such schedule.
>
> The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders. The market agencies sought to enjoin the enforcement of those orders by suit filed in a Federal District Court of three judges. The court, on December 31, 1934, sustained the orders. The market agencies have taken steps to appeal the case to the Supreme Court of the United States. It is not deemed wise to receive and file the proposed new schedule of rates and charges which are in conflict with those found by the court to be fair to the market agencies." (R. 10)

The appellees before the effective date of the schedule in question, filed on October 31, 1935, their petition setting

forth the facts, as stated herein, and praying among other things

> "That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the Orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402; and from interfering in any manner, civil or criminal, with the collection of rates and charges specified in the schedule or tariff attached as Exhibit A to this petition and complaint, and from threatening to interfere with the collection of the rates and charges specified in such schedule, and enjoining and restraining the Secretary of Agriculture from suspending the registration of any of the petitioners and plaintiffs because of his or its collection of the rates and charges in such schedule,—all until the further order of the Court;" (R. 13)

Not a single allegation in the petition has been or is now denied by the Government. Its defense to the application for preliminary injunction was on the question of whether the market agencies had the right and power, under the Packers and Stockyards Act to initiate a new rate schedule subject to the regulative powers of the Secretary under the Act.

The application for interlocutory injunction was allowed and order entered December 3, 1935 (R. 28). The *per curiam* opinion of the District Court appears at page 23 of the Record and its Findings of Fact and Conclusions of Law immediately follow the opinion. The Conclusions of Law of the Statutory Court held that the rejection by the Secretary of Agriculture of the schedule of rates and charges tendered to him was unreasonable and arbitrary and without authority of law and that the Secretary could not by arbitrarily refusing to file the tendered schedule, render unlawful and ineffective the schedule of rates and charges therein (R. 27, 28).

Upon the merits of the controversy, the Court concluded:

> "The fact that the Secretary of Agriculture had previously acted to fix rates and charges of these market agencies does not thereafter deprive the market agencies of the right to initiate and file lawful rates for their services in the manner provided by the Packers and Stockyards Act, which thereupon become the lawful rates, subject to their suspension by the Secretary of Agriculture, and to being superseded by the Secretary, in manner and form as in said Packers and Stockyards Act provided." (R. 27)

SUMMARY OF ARGUMENT.

I.

The schedule of rates published and posted by the appellees and delivered to the Secretary for filing on October 19, 1935 to be effective November 1, 1935 is valid and legally in force. The Packers and Stockyards Act gives to market agencies the right to make rates subject to their suspension by the Secretary of Agriculture, upon his assigning a reason therefor and deferring the use of such rates until after hearing. After a hearing and determination, the Secretary may permanently supersede the rates initiated by the market agencies. If the Secretary does not suspend a schedule of rates duly filed, published and posted, such schedule goes into effect by operation of law upon its effective date.

The Packers and Stockyards Act is modeled after the Interstate Commerce Commission Act which has been interpreted by this court in accordance with the construction contended for the Packers and Stockyards Act.

The fact that the Secretary of Agriculture had previously acted to fix rates and charges of the market agencies does not thereafter deprive them of the right to initiate and file lawful rates for their services in the manner provided by the Packers and Stockyards Act which thereupon become the lawful rates subject to their suspension by the Secretary of Agriculture and to being superseded by the Secretary in manner and form as in the Packers and Stockyards Act provided.

II.

The Statutory Court had jurisdiction of this cause. The proceedings were brought to enjoin orders of the Secretary of Agriculture. The Secretary insisted upon compliance with his orders of January 8, 1934 and March 12, 1934 and threatened penalties for violations. The injunctional order of the statutory court prevents the enforcement of those orders.

III.

The duties of the market agencies in respect to the filing of the schedule of October 19, 1935, were performed upon the delivery of such schedule to the Secretary to be kept on file. The requirement of the Packers and Stockyards Act that rates be filed with the Secretary is to give that officer notice. This he got. He could not, by refusing to retain the schedule, prejudice the rights of the appellees who had done all in their power fully to comply with the Act.

The essential thing to a filing is the deposit of a paper or document with the proper officer with notice of the purpose and intent that he should retain it. The failure of the officer to perform his duty when a paper is delivered for filing does not render the filing ineffective. The Secretary could not refuse the schedule and then say it was not filed.

ARGUMENT.

I.

THE SCHEDULE OF RATES PUBLISHED BY THE APPELLEES ON OCTOBER 19, 1935, TO BE EFFECTIVE NOVEMBER 1, 1935, IS VALID AND LEGALLY IN FORCE.

Before discussing argumentatively the proposition stated above, reference is made to the petition filed in the District Court. The petition alleges (R. 5) that in September, 1932, the Secretary of Agriculture entered an order of inquiry and notice of hearing against the market agencies at Chicago Union Stock Yards for the purpose of determining the lawfulness and reasonableness of the rates and charges of the petitioners (appellees); that hearings were had; that on January 8, 1934, the Secretary issued an order containing a schedule of purported reasonable rates and charges; that after the denial of a petition for rehearing a supplementary order of March 12, 1934, was entered, modifying the prescribed rates by some extent; that on April 12, 1934, a second petition for rehearing was denied.

The petition then sets forth the proceedings in the case of *C. H. Acker, et al.* v. *United States of America, et al.*, now No. 655, October term, 1935 in this court. In the *Acker* case, a motion for a preliminary injunction restraining the enforcement of the orders of January 8, 1934 and March 12, 1934 was allowed. Upon final hearing, the District Court on March 19, 1935, entered a decree dismissing the complaint in the *Acker* case. An appeal brought the suit to this court.

It is further alleged in the petition (R. 6) that the rates and charges prescribed by the Secretary in his orders were the result of an investigation of costs, volume of business,

and receipts for the years 1931 and 1932; and that subsequent to those years, subsequent to the orders of the Secretary, and subsequent to the hearing and decree of the District Court the receipts of live stock by the petitioners had decreased in volume and that changed economic conditions and decreased volume of receipts had created such hardship and caused such loses that the petitioners (appellees) were compelled in self-preservation to file the schedule of rates and charges now in litigation.

Further the petition alleges (R. 6, 7, & 8) that before the schedule was filed with the Secretary of Agriculture representatives of the market agencies had conferred with the Department of Agriculture and had been advised that the Department was sympathetic but could do nothing because of the pendency of the *Acker* case to test the validity of the Secretary's orders.

The petition recites (R. 8) the preparation, filing, and posting of the schedule of October 19, 1935 in accordance with the provisions of the Packers and Stockyards Act, 1921; that the Secretary (R. 9 & 10) refused to retain the schedule which had been delivered to him but returned it with the comments

> (1) "that once the Secretary, in compliance with the Act, has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding"; and
>
> (2) "The schedule is also rejected because of pending litigation involving the validity of the above-mentioned orders (the orders of January 8, 1934 and March 12, 1934 in Bureau of Animal Industry Docket 402)".

Further the allegations are made (R. 11) of full compliance in the preparation, filing, and posting of the schedule of October 19, 1935, with Packers and Stockyards Act and

the General Rules and Regulations of the Secretary of Agriculture thereunder; that the refusal of the Secretary to retain the schedule tendered to him was a nugatory act; that it was the duty of the Secretary if he believed the rates and charges contained in this schedule to be unjust, unreasonable, or discriminatory to at once suspend such schedule, as provided by the Act, in order that a hearing and a determination might be made whether such rates and charges were just, reasonable, and non-discriminatory.

The petition then alleges (R. 11-12) that the schedule of October 19, 1935, was effective on November 1, 1935, and that if the rates of such schedule were not collected the petitioners would be subjected to penalties; and that on the other hand the Secretary threatened prosecution for failure to obey his previous orders.

The prayer is then made (R. 12) that a preliminary injunction issue restraining the defendants from enforcing or threatening to enforce the orders of the Secretary of Agriculture in Bureau of Animal Industry Docket 402 and from interfering with the collection of rates and charges specified in the schedule of October 19, 1935. The schedule appears in the printed record beginning at page 13. The concrete and specific facts in reference to its preparation, posting and filing are found in the affidavit of E. M. Hughes (R. 18), and are not denied except that the Government now contends that the schedule was not filed with the Secretary because he sent it back.

It is upon this state of facts that the Government contends that the schedule of October 19, 1935 is illegal and void. No denial is made by the Government of the facts alleged in the petition. The Government in the court below and in this court stands solely on propositions of law drawn as conclusions applicable to the ultimate acts set forth in the petition.

One of the ultimate facts alleged in the petition (R. 6) is the decrease in volume of live stock handled by the market agencies, and that rates which might have been adequate for the years 1931 and 1932 were inadequate when the new schedule was filed. In support of the allegation of changed economic conditions and decrease in volume, we have added to this brief as Appendix A excerpts from publications of the Department of Agriculture showing among other things:

1. The aggregate supply of meat animals on farms at the beginning of 1936 was the smallest in more than thirty years;

2. The number of hogs on farms at the beginning of 1935 was the smallest in fifty years;

3. The number of cattle at the beginning of 1935 was 7,600,000 smaller than at the beginning of 1934;

4. Hog production in 1933 and 1934 was the smallest in many years;

5. Sheep numbers on January 1, 1935 were the smallest since 1929;

6. The year 1934-35 shows the smallest slaughter of hogs in twenty-five years and that for the year 1935-36 the number of hogs sold for slaughter will be even smaller;

7. Because no such reduction, either in numbers or in percentages, has ever before taken place, the Department is unable to predict how rapidly a recovery can be made;

8. The decrease in cattle supplies which would normally have extended over a five-year period from 1936 to 1940 occurred in a single year in 1934;

9. The 1935 lamb crop in the Western sheep States was the smallest since 1927.

The Secretary's attempted justification in returning the schedule of October 19, 1935 to the market agencies was

(1) because of pending litigation involving the validity of his orders in the *Acker* case; and

(2) because he contended, as stated in his letter of October 26, 1935 (R. 10), that once the Secretary has prescribed a schedule of rates and charges for a particular market no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction.

The first alleged justification is so lacking in merit that it was not mentioned by the Government below and is not referred to in the Government's brief in this court. We cite in a footnote on this page several cases showing the lack of merit in the first alleged justification of the Secretary.*

The Packers and Stockyards Act, 1921, gives to market agencies the primary right to make rates subject to their suspension by the Secretary of Agriculture upon his assigning a reason therefor and deferring the use of such rates until after hearing.

The second alleged justification of the Secretary in returning the schedule of October 19, 1935, delivered to and received by him for filing, was

"that once the Secretary, in compliance with the Act,

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* *Monroe Gas Light & Fuel Co.* v. *Michigan Public Utilities Co.*, 292 F. 139; *New York Telephone Company* v. *Prendergast*, 36 F. (2) 54; *Clear Creek Power & Development Company* v. *Public Service Commission*, P. U. R. 1928A, 506 (Colo. Public Utilities Commission (1927); *City of Bluefield* v. *Public Service Commission*, 113 S. E. 745; *Re New York Tel. Co.* (#6177, N. Y. Public Service Commission (May 1, 1930)); *Mosel* v. *San Antonio & A. P. Ry. Co.*; 249 S. W. 893, 177 S. W. 1048, 180 S. W. 1138, 195 S. W. 621 (Texas Civil Appeals (1923)).

From the foregoing cases it appears that an administrative body does not lose jurisdiction to provide a schedule of rates to meet changed and changing conditions. The reasonableness of a rate order can be determined only as of a specified time. The enactments of the Packers and Stock Yards Act provide for changes in rates and put no limitation or condition upon the time or times when such changes may be made, except to provide that there must be proper notice to the interested parties.

> has prescribed a schedule of rates and charges for a particular market, no change in those rates and charges can be made except by the Secretary or by a court of competent jurisdiction in a proper proceeding" (R. 10).

In view of this assertion, it becomes necessary to refer to the Packers and Stockyards Act. (That Act is set forth as Appendix B to this brief and as an appendix in the Government's Brief.)

Section 301 of the Act defines terms used therein. Section 302 provides that when any stockyard comes within the definition given in that section, the Secretary shall

> "give public notice thereof by posting copies of such notice in the stockyard".

Thereafter such stockyard is to remain subject to the provisions of the Act [illegible] contrary notice is given.

Section 303 provides that after the expiration of thirty days from the time the Secretary has given public notice that any stockyard is within the coverage of the Act,

> "no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary".

It is provided in Section 304 that it is the duty of every market agency to furnish, upon reasonable request, without discrimination, reasonable stockyard services; and Section 305 provides that

> "All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory".

Section 306(a) provides that within sixty (60) days after the Secretary has given public notice that a stockyard is within the coverage of the Act

> "every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all

rates and charges for the stockyard services furnished by such person at such stockyard."

Sub-section (b) of Section 306 refers to the content and form of such schedules and authorizes the Secretary to prescribe further in respect to such matters and the manner of posting for public notice.

Section 306(c) of the Act provides:

> "No changes shall be made in the rates or charges so filed and published, *except after ten days' notice to the Secretary and to the Public filed and published as aforesaid,* which shall plainly state the changes proposed to be made and the time such changes will go into effect;" (Italics supplied, here as elsewhere herein.)

Section 306(e) provides as follows:

> "*Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may,* either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but *upon reasonable notice, enter upon a hearing* concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon *filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension,* may *suspend the operation of such schedule and defer the use of such rate,* charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect;"

The same subsection further provides that after *full* hearing

> "The Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it (the rate) had become effective".†

† The reference in this subsection to proceedings initiated after the rate had become effective is to Section 310 which provides for investigation and hearing made by the Secretary either upon his own initiative or upon complaint to determine whether rates of any market agency are or will be unjust, unreasonable or discriminatory.

Thus Section 306 gives to the Secretary the discretionary mandate either to suspend a new schedule filed with him and posted in accordance with the Act and his regulations, and enter upon a hearing; or permit the schedule to go into effect by operation of law. He cannot, merely by the refusal to consider a schedule filed, prevent its becoming operative. The Act provides for only one situation in which the Secretary may refuse to file a schedule. This provision is found in Section 306(d) which authorizes the Secretary to

> "reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date".

This provision has no pertinency here.

If the Secretary believed that the market agencies in this case had no right or power to file the schedule of October 19, 1935, his proper course would have been to start proceedings in the District Court in Chicago to enjoin the collection of the rates specified in such schedule. Such action is authorized under Section 315 of the Packers and Stockyards Act to enforce compliance with the Secretary's orders, in this case the orders of January 8 and March 12, 1934.

The Secretary could not reject the schedule under the provisions of 306(d); he did not suspend the operation of a schedule in order to make a determination of the reasonableness of the rates specified therein; he did not commence proceedings to enforce compliance with his orders and enjoin the enforcement of the schedule of October 19, 1935. Instead he took a step, entirely arbitrary and unreasonable, usurping a power that he did not have, and which it is doubtful if Congress could have conferred upon him. Instead of taking either of the courses permitted and authorized, the Secretary, upon his own initiative and without warrant or authority, rejected and refused to keep

the schedule because of pending litigation and because he had once, in the past, prescribed orders for the Chicago yards.

The position of the Government amounts to the contention that orders of an administrative body or a commission affecting charges and rates are judgments *in rem*, such as judgments determining the title to real estate.

Nor are rate orders *res adjudicata*. This court in *Tagg Bros.* v. *United States*, 280 U. S. 420, 445, said:

> "A rate order is not *res judicata*. Every rate order may be superseded by another".

Rate orders obviously can be tested as to validity only as of a specific time. The orders attacked in the *Acker* suit were based upon a hearing had in 1933. The evidence adduced related to the years 1931 and 1932. The question in the *Acker* case is whether or not the rates prescribed by the orders of the Secretary were or were not unreasonable as of the time of the hearing. The question in this suit is of the power of the Secretary to refuse himself to make, and to refuse to allow the market agencies to make, a new rate structure.

If rate schedules could be static things, legislatures themselves could fix rates rather than delegating such duties to an administrative officer or body. The legislatures see the futility of attempting to do that which requires constant attention to fluctuating factors of cost, volume, and revenue.

The argument of the Government is that sub-sections (a), (c), and (e) of Section 306 relate to the procedure for filing rates only in the absence of action by the Secretary. In other words, the contention is that market agencies have the right once, and once only, to initiate rates, that is, within the 60-day period after the Secretary has posted a stockyards as coming within the coverage of the Act.

Further, the Government contends (Brief, p. 28, *et seq.*) that since Section 310(a) which empowers the Secretary to prescribe rates, provides that he

> "May determine and prescribe what will be the just and reasonable rate or charges to be thereafter observed",

therefore a rate order entered by the Secretary must stand forever unless it is charged by the Secretary or set aside by a court.

This argument places an entirely unreasonable construction upon the statute. A rate order may be perfectly reasonable, and upheld by a court as of the time of the hearing, but as this Court has said, a rate order is not *res adjudicata* Conditions may change, volume may decrease, and costs may increase. All of this has happened in this case, emphasizing that a rate good at one time may be either too high or too low in the future. The rule works both ways. Upon the Secretary's construction of the Act, the market agencies would be powerless to file a rate schedule *lowering* rates. Indeed, in the very schedule under question some of the rates are lower than those prescribed by the Secretary and others are no higher. prescribed by the Secretary and others are no higher.*

The words of Section 310(a) that rates prescribed are to be thereafter observed, means that such prescribed rates are to be observed until they are changed in a manner provided by law. And that manner may be either

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Calves.

* The Secretary's rate is 25c per head for consignments of 16 to 30 head. For each head over 20, the appellee's rate is 20c.

Cattle.

In two brackets the charges are the same.

Pigs.

In the bracket 40-50 head the charges are the same.

Hogs.

In the bracket 40-50 head the charges are the same.

Sheep.

In three brackets the rates are the same.

upon the initiation of the Secretary, or as provided in Section 306, upon the initiation of the market agencies themselves.

If new rates are initiated by the market agencies by filing and posting a new schedule, they do not go into effect at once unless the Secretary permits it. He has power to regulate. He can suspend a schedule for a reasonable time to have a hearing; and after a hearing and a determination, he may suspend the proffered schedule permanently. The construction placed upon the Act by the appellees does not take vitality from the Act as the Government contends.

The Secretary's position, on the other hand, is that once he has spoken, no change in rates can be made unless he chooses to speak again,—if ever, and this regardless of changed conditions, great or small. He refused administrative relief because it was against the policy of the Department of Agriculture to change a rate schedule while litigation was in process respecting one of his orders (Letter September 23, 1935, R. 6; letter September 30, 1935, R. 8; letter October 26, 1935, R. 10). He attempts now to refuse to permit the market agencies to initiate a rate as such agencies are authorized to do under the Act. Apparently the Secretary takes the position that his orders affecting rates shall be "like the laws of the Medes and Persians which altereth not".

Single provisions or paragraphs or sentences of an Act must be interpreted and construed by and with the entire Act. Consequently the language of the statute that a rate order prescribed by the Secretary shall continue in effect until his further order, must be considered with the provisions of the entire act which specifically direct that market agencies may file new tariffs, upward or downward, from time to time, subject to the provisions of the Act that the rates so scheduled must be just and reasonable and subject to the supervision of the Secretary to see that they are.

The section of the Act, 313, which provides that an order of the Secretary is in force until his further order, means simply and certainly that before any other rates can be demanded or collected a new schedule must be filed and posted in accordance with the law and with the opportunity to the Secretary to investigate and determine whether such rates so proposed are or are not just and reasonable.

> "The intention of the Legislature, when properly ascertained, must govern in the construction of every statute. For such purpose the whole statute must be examined. Single sentences and single provisions are not to be selected and construed by themselves, but the whole must be taken together."

Pollard v. *Bailey*, 87 U. S. 520, 525.

If the legislature had intended that a schedule of rates and charges was to be once determined and thereafter forever be in force, the legislature itself might well have determined, if it had the power, what those rates would be.

The attempted exercise of power by the Secretary to deny to the appellees their duly filed and posted rate schedule, without affording the hearing provided by the Packers and Stockyards Act, was not only unjust and unreasonable but highly arbitrary. The Act gives the Secretary a discretion when a schedule is filed. He may do one of two things: Permit the schedule to go into effect by operation of law; or suspend it before its effective date so that a hearing can be had. Within these limits of discretion the Act is mandatory, and the Secretary cannot blaze for himself, without a suggestion of authority, a new and third pathway of discretion, namely, an attempted rejection of the schedule and the threat to exact penalties unless the plaintiffs submit to his unwarranted expansion and transgression of the Act under which he exercises any power at all.

The Packers and Stockyards Act is modeled after the Interstate Commerce Commission Act and should receive a like construction.

The Packers and Stockyards Act gives to the Secretary of Agriculture not only powers but duties. Those powers and duties, in respect to the business regulated, are similar to the powers and duties conferred upon the Interstate Commerce Commission by the Act of 1887, the Hepburn Amendment of 1906, and other amendments of less import. Provisions of the statutes relating to enforcement of orders of the Interstate Commerce Commission are made applicable to the Packers and Stockyards Act. (Sec. 316.)

A comparison of the provisions and language of the two Acts makes very clear the powers and duties of the Secretary. In order that the comparative provisions of the respective acts may be the more readily observed, the comparable sections are set opposite each other in the following table:

PACKERS AND STOCKYARDS ACT, 1921.	INTERSTATE COMMERCE COMMISSION ACT.
Section 207(a) Title 7, U. S. Code.	Section 6 (1) Title 49, U. S. Code.
The stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges * * *.	Every common carrier subject to the provisions of this chapter, shall file with the commission created by this chapter and print and keep open to public inspection schedules showing all the rates, fares and charges for transportation * * *.
Section 207(c).	Section 6 (3)
No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the public, filed and published as aforesaid. * * *.	No change shall be made in the rates, fares and charges * * * which have been filed and published by any common carrier in compliance with the requirements of this Section except after thirty days' notice to the commission and to the public published as aforesaid * * *.

Section 211.

Whenever after full hearing upon a complaint * * * or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative * * *, the Secretary is of the opinion that any rate, charge, regulation or practice of a stockyard owner or market agency, * * * is or will be unjust, unreasonable, or discriminatory, the Secretary (a) may determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case * * *; and (b) may make an order that such owner or operator * * * (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyards services other than the rate or charge so prescribed * * *.

Section 207(e).

Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative, without complaint, at once * * * but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation or practice and pending such hearing and decision thereon, the Secretary upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regula-

Section 15 (1).

Whenever, after full hearing, upon a complaint * * * or after full hearing under an order for investigation and hearing made by the commission on its own initiative * * *, the commission shall be of opinion that any individual, or joint rate, fare, or charge, * * * is or will be unjust or unreasonable, * * * the commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, * * * to be thereafter observed in such case, * * * and to make an order that the carrier or carriers * * * shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation or transmission other than the rate, fare or charge so prescribed * * *.

Section 15 (7).

Whenever there shall be filed with the commission any schedule stating a new individual or joint rate, fare, or charge, * * * the commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, * * * but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, * * *; and pending such hearing and the decision thereon, the commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the

tion or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, * * * the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.	use of such rate, fare, charge, * * * but not for a longer period than one hundred twenty days beyond the time when it would otherwise go into effect; and after full hearing * * * the commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective.
Section 214.	Section 15 (2).
Except as otherwise provided in this chapter all orders of the Secretary * * * other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order and shall continue in force until his further order or for a specified period of time according as is prescribed in the order unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.	Except as otherwise provided in this chapter, all orders of the commission other than orders for the payment of money, shall take effect within such reasonable time, not less than thirty days and shall continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order, unless the same shall be suspended or modified or set aside by the commission, or be suspended or set aside by a court of competent jurisdiction.

Under the Interstate Commerce Commission Act as originally enacted, the Commission had no power to prescribe rates and charges. This power was conferred by the Hepburn Act of 1906, amending the original Act. The Hepburn Act empowered the Commission to determine and prescribe rates upon investigation and hearing; and provided that such orders of the Commission should continue in force until its further order or for a specified period of time unless the same should be suspended or modified or set aside by the Commission, or be suspended or set aside by a court of competent jurisdiction.

The same provisions in respect to the fixing of rates continuing in force are found in the Packers and Stockyards Act, quoted in the table above.

Even after the amendment in 1906 to the Interstate Com-

merce Act, it has been held repeatedly that the primary rate maker is the carrier. In *I. C. C.* v. *L. & N. R. R. Co.*, 227 U. S. 88, 92, the Court said:

> "Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order."

In the instant case, the Secretary undertakes to enforce his mandate without hearing any evidence.

The Government in the case just cited contended that the finding of the Commission was conclusive and could not be set aside even if the finding was wholly without substantial evidence to support it. To this contention the Court replied, p. 91:

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved. A finding without evidence is arbitrary and baseless. And if the government's contention is correct, it would mean that the Commission had a power possessed by no other officer, administrative body, or tribunal under our government. It would mean that, where rights depended upon facts, the Commission could disregard all rules of evidence, and capriciously make findings by administrative fiat. Such authority, however beneficently exercised in one case, could be injuriously exerted in another, is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercise of power."

The condemnation by the Court of the Government's contention in the case quoted from justifiably could be made much stronger had the Commission refused any hearing at all as the Secretary has done here.

In *Skinner & Eddy Corp.* v. *U. S.*, 249 U. S. 557, this

Court summarizes the rate-making powers under the Interstate Commerce Commission Act. The Court said (pp. 564-565):

"The main contention of plaintiff is that, as the carriers had in 1916 reduced the rate from 80 cents to 65 cents, neither the carriers nor the Commission had power to increase the rate without a prior finding by the Commission upon proper hearing 'that such proposed increase rests upon changed conditions other than the elimination of water competition'; and that no such hearing had been had or finding made.

In construing this provision it is important to bear in mind the limits of the Commission's control over rates. *Neither the Act to Regulate Commerce nor any amendment thereof has taken from the carriers the power which they originally possessed, to initiate rates;* that is, the power, in the first instance, to fix rates or to increase or to reduce them. Legislation of Congress confers now upon the Commission ample powers to prevent by direct action the exaction of excessively high rates. The original act, proceeding upon the common-law rule which prohibits public carriers from charging more than reasonable rates, gave the Commission power to declare illegal one unduly high; but even after such a determination the Commission lacked the power to fix the rate which should be charged. *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *Interstate Commerce Commission,* 162 U. S. 184, 196-197; *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Ry. Co.,* 167 U. S. 479; *Interstate Commerce Commission* v. *Alabama Midland Ry. Co.,* 168 U. S. 144, 161. Effective control was not secured until the Act of 1906 had given to the Commission the power to fix, after such hearing, the rate which should be charged; *Interstate Commerce Commission* v. *Humboldt S. S. Co.,* 224 U. S. 474, 483; and the Act of 1910 had given it power to suspend, during investigation, tariffs for new rates, and placed upon the carrier the burden of proof to establish the reasonableness of the increased rates. *M. C. Kiser Co.* v. *Central of Georgia Ry. Co.,* 236 Fed. Rep. 573."

Again, in *United States* v. *Illinois Central R. R.,* 263 U. S. 515, 522, the Court said:

"A carrier is entitled to initiate rates, and, in this

> connection, to adopt such policy of rate making as to it seems wise." (Citing cases.)

See also *I. C. C.* v. *Union Pac. R. R. Co.*, 222 U. S. 541, 550, in which the court refers to "presumption of right conduct by the carrier as primary rate maker."

A host of cases may be found deciding that a properly filed schedule of rates and charges is the one and only lawful and correct rate. See *Penn. R. R. Co.* v. *Titus*, 216 N. Y. 17, 109 N. E. 857; *Penn. R. R. Co.* v. *International Coal Mining Co.*, 230 U. S. 184, holding that a published tariff, so long as it is in force, has the effect of a statute; *L. & N. R. R. Co.* v. *Maxwell*, 237 U. S. 94, 97, in which it is said:

> "Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge."

If a schedule of rates is duly and properly filed and gives adequate notice to the administrative body and to the public, that rate goes into operation upon the effective date noticed therein unless the administrative body, the Interstate Commerce Commission, or the Secretary, either upon complaint or self-initiation, suspends the schedule and enters upon a hearing. That hearing is not a perfunctory affair. The statute says that it must be a full hearing. This means a hearing as of *now*, and not as of 1931 or 1932.

The power of the Interstate Commerce Commission and its duty to investigate and determine the reasonableness of a proposed schedule is so apparent that it is held to be initially within the exclusive jurisdiction of the Commission. Headed by the Supreme Court, the federal tribunals deny to themselves jurisdiction to suspend or enjoin the operation of a schedule of rates unless the Commission has first heard and determined the complaint against the charges or changes in the schedule. *Director General of Railroads* v. *The Viscose Company*, 254 U. S. 498; *Skinner & Eddy Corp.* v. *United States*, 249 U. S. 557; *Kiser* v. *Central of Georgia Ry. Co.*, 236 F. 573.

We have shown the similarity, not only in general structure but in specific language, between the Interstate Commerce Commission Act and the Packers and Stockyards Act. It would seem entirely clear from a reading of the Packers and Stockyards Act, without the precedent and help furnished in its construction by the similar Interstate Commerce Commission Act, that market agencies at a stockyards are the primary rate makers and that the Secretary's duty is to see that rates made are not and do not become unjust, unreasonable, or discriminatory.

It will be perceived that the Packers and Stockyards Act contemplates a change in rates either by increase or reduction and provides the conditions therefor. Of what significance is the grant of this privilege if a rate that has been prescribed by an Order of the Secretary is to last forever or until the Secretary chooses to speak again? The fact that market agencies, like common carriers, are given the power to establish rates in the first instance, and the right to change with the manner of such change specified, is irresistable evidence that the filing and posting of a new schedule is not subordinate to and dependent upon the judgment or discretion of the Secretary except after a full hearing. The Secretary cannot, by peremptory order and threat, compel the plaintiffs to follow in the *future,* the extent of which the Secretary himself claims the right to determine, rates that have been determined to have been in the *past* reasonable and just.

The construction contended for the Packers and Stockyards Act by the Secretary would make the Act unconstitutional. It would deprive market agencies of their property without due process of law by imposing upon them unjust and unreasonable rates. It would confer upon the Secretary powers which no administrative body or officer in this country has ever had or ever assumed. The Secretary's construction is entirely unreasonable. Statutes are given a

reasonable construction with a view to make effectual the legislative intent in their enactment. *Rogers* v. *Peck*, 199 U. S. 425, 435.

The construction contended for by the Government, namely, that when a rate order is once entered it can be changed only by the Secretary, regardless of lapse of time or change in conditions, would put the Packers and Stockyards Act beyond the power of Congress to have enacted. The Act was held in *Tagg Bros.* v. *U. S.*, 280 U. S. 420, to be a constitutional exercise of the power of the Federal legislature over interstate commerce. The constitutionality of the Act depends upon Article 1, § 8, Clause 3 of the Constitution, which reads:

> "To regulate commerce with foreign nations, and among the several states, and with Indian tribes."

The delegated power is to regulate; the redelegation to the Secretary of Agriculture is also to regulate. The Supreme Court in *Second Employers' Liability* cases, 223 U. S. 1, defines regulate to mean (p. 47)

> "to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large."

The power demanded for and by the Secretary transcends any power which Congress could or did give him. The authority that he would assume, however well-intended or beneficently exercised in one case, could be injuriously exercised in another, is inconsistent with rational justice and comes under the Constitution's condemnation of all arbitrary exercise of power.

The intent of the legislature is clear both in the Interstate Commerce Commission Act and the Packers and Stockyards Act. The legislature recognizes that in no proper sense is the public a general manager of a business and hence leaves to the regulated business the primary duty and privilege of initiating rates, subject to the supervision

of the Commission or the Secretary. The cases cited show that the intention of the legislature was clear; it can be properly ascertained; and it must govern in the construction of the statute. *Pollard* v. *Bailey,* 87 U. S. 520, 525. And again, if a section admits of two interpretations, one of which brings it within, and the other of which presses it beyond the constitutional authority of Congress, it is the duty of a court to adopt the former construction. It was so directed by Justice Story, speaking for the Court, in *U. S.* v. *Coombs,* 37 U. S. 72, 76.

The Government expresses fears that the construction of the Packers and Stockyards Act, contended for by the appellees and held by the Statutory Court, will nullify the Act. The Government puts the extreme case that immediately after the Secretary enters an order in respect to a particular market, the market agencies there can defeat the regulatory power of the Secretary by at once filing a new schedule.

The answers to this contention are obvious:

1. The Interstate Commerce Commission Act has not been nullified. On the contrary, the regulative powers conferred therein are extremely effective.

2. The case put by the Government is the extreme, and not the probability. Market agencies will not file, without cause, schedules to bring upon themselves an extensive and expensive hearing.*

3. Market agencies will not file schedules knowing that doing so will be a futile act, as where, since the entry of the Secretary's rate order, there have been no changes in

* The Government's Brief, page 24, recites "the mass of detail involved", "the extensive cost studies", "the voluminous evidence", involved in the task of determining just and reasonable rates. In the *Acker* case there were over forty volumes of testimony, printing a record for judicial review cost over $3,000, the statistical evidence of the market agencies include Exhibit 12, a book of schedules and tables two inches thick and involving months of time and thousands of dollars in preparation. Market agencies will not bring this expense upon themselves without cause.

conditions, costs, volume of business, or other factors influencing costs and income.

The Government, relying upon the *Tagg* Case, 280 U. S. 420 (Brief, p. 32, *et seq.*), says that the remedy of the appellees under the circumstances of which they complain was by rehearing. The answer made to this contention by the Statutory Court was that that is not the method provided by the statute. Further, the appellees had twice applied for rehearings which were promptly denied (R. 5). The conference with the Department of Agriculture recited in the letter of Sept. 23, 1935, (R. 6-7) and the assertion of the Department that it was against its policy to consider any rate change while litigation was pending (R. 10) would have made further petitions for rehearing futile.

Thus the suggestion made in the *Tagg* Case was followed. Moreover the decision in that case make the further suggestion which Government counsel overlook, namely: that (p. 445)

> "the appropriate remedy is to apply for a rehearing before him *or to institute new proceedings*".

The suggestion made in the italicized language above was followed. Judicial review was sought; and the schedule of October 19, 1935 was filed.

The Packers & Stockyards Act provides in Section 309 that complaints may be made to the Secretary by shippers or representatives, official or otherwise, of shippers. The Act further provides that the Secretary may, on his own motion, with or without complaint, institute proceedings in respect to rates. The appellees contend and the District Court found that market agencies may also institute proceedings. If this is not the law, then the only persons who cannot initiate proceedings in respect to rates are the regulated persons. If the market agencies, more vitally interested in rates than anyone else, are to be prevented from initiating any proceeding

in respect to their rates, although others less vitally interested may, an unfair construction is given to the Act. Such could not have been the contemplation of Congress. Stated tritely, it is an unfair rule which does not work both ways.

Judicial review of a rate order is one thing. The establishment of a new rate is another. Judicial review operates only upon *past* facts. A rate order operates in the *future*. This Court may decide that the rates prescribed in the *Acker* Case were reasonable. Such a decision would mean that the rates prescribed in the orders involved in the *Acker* case were reasonable as of the time of the hearing. It does not follow that such rates would be reasonable now or on November 1, 1935, when the new schedule went into effect. This statement is startlingly emphasized in the instant case. At the time the Secretary prescribed his rate orders he did not know and could not foresee the havoc caused by the drought, and the decrease in supplies of livestock, as shown in Appendix "A". And if he realized the effect upon the market agencies by the program of curtailment of production then being embarked upon, he did not give consideration to it.

The Government contends (page 26) that the construction of the Act contended for by the appellees would make it possible for them to defeat the power of the Secretary to regulate rates "without any showing or finding that there had been any change in economic conditions". Such change was alleged in the petition repeatedly. Those allegations have yet to be denied either in the lower court or here, either by answer or otherwise.

In respect to the suggested method of petition for rehearing, the Government refers to *Atchison, Topeka & Santa Fe Ry. Co.* v. *U. S.*, 284 U. S. 248. When the petition for rehearing was filed in the *Santa Fe* case before

the Interstate Commerce Commission, the case was still in that tribunal. In the instant case the first tribunal, the Secretary, has acted; and a second tribunal (in the *Acker* case) has acted. And the Secretary refused to act further "because of pending litigation" (R. 10)—and this even though he had been advised by brief of the appellees and by the Department of Justice that he could act (R. 7, Folio 13). It was stated:

> "that as a matter of policy the Department would not consider any increase of rates while the litigation is (was) pending" (R. 7, Folio 13).

It is submitted that the market agencies have the power reserved to them in the Packers & Stockyards Act to initiate rates by filing and posting schedules in compliance with the Act; and that when such schedules have been filed and posted, the duty is then cast upon the Secretary by the Act either to suspend the rates contained in such schedules in order for a full hearing and determination; or permit the rates to become effective by operation of law. The Secretary cannot blaze for himself a new path and, by refusing to retain the schedules, exercise a veto power which no other administrative officer has ever attempted to exercise.

If the Secretary and his counsel be correct in their interpretation of the Packers & Stockyards Act, there is a method provided in that Act itself to have prevented the schedule of October 19, 1935, from becoming effective, namely: the institution of a suit in the District Court at Chicago for the enforcement of the Orders of January 8, 1934 and March 12, 1934. It is so provided in Section 315.

II.

THE STATUTORY COURT HAD JURISDICTION OF THIS CAUSE.

It is of significance, first, that the Government, by its belated attempt to challenge the jurisdiction of the Statutory Court, forsakes the position which was taken in that Court, namely, that the Orders of the Secretary of January 8, 1934 and March 12, 1934 were in force and that their enforcement should not be restrained. Below we will refer more fully to the position of the Government in the Statutory Court to prove the assertion just made.

It is of significance, second, that in the Statutory Court, neither by its motion to dismiss nor by brief or argument did the Government challenge the jurisdiction of the Court.

It is of significance, third, that in its assignment of errors (R. P. 30), the Government did not challenge the jurisdiction of the Statutory Court.

It is of significance, fourth, that in the statement of jurisdiction filed in this Court, the question of the jurisdiction of the Statutory Court is not raised.

The Proceedings in the Statutory Court Were Brought "to Enjoin, Set Aside, Annul, or Suspend, in Whole or in Part" an Order of the Secretary of Agriculture.

The appellees filed and published on October 19, 1935, the schedule of rates and charges (R. 13) now being collected at the Chicago Yards pursuant to the provisions of the order for interlocutory injunction of December 3, 1935. In response to the communication transmitting the schedule to the Department of Agriculture, the Secretary replied:

> "It is noted that this schedule sets out rates and charges other than those set forth in the orders issued by the Secretary of Agriculture on January 8, 1934, and March 12, 1934, in B. A. I. Docket No. 402, pre-

> scribing rates and charges for stockyard services on the Chicago Stock Yards. * * * In accordance with the provisions of the Packers and Stockyards Act, 1921, the orders specifically directed that no 'market agency shall publish, demand, or collect any rate or charge for the furnishing of any stockyard service in excess of the rate or charge hereinbefore determined to be just, reasonable, and non-discriminatory for the furnishing of such service.' Severe penalties for violations of such orders are imposed by the act. *The Secretary will insist upon compliance with his orders.*" (R. 10)*

The Secretary referred specifically to *orders,* identifying them by date and docket number; he called attention to severe penalties for violation of such *orders;* he stated that he would insist upon compliance with his *orders.* In view of the insistence upon compliance with the *orders* of January 8, 1934 and March 12, 1934, and in view of the allusion to severe penalties for the violation of such *orders,* it seems a mere play upon words for the Government now to contend that the suit was not one to enjoin, set aside, annul or suspend *an order.*

It can be of no moment to the substance of this litigation that the interlocutory injunction (R. 28) does not in terms refer to any specific order of the Secretary. The Court referred in Findings of Fact to the orders of January 8, 1934 and March 12, 1934 and stated:

> "On the other hand, the Secretary of Agriculture and the United States District Attorney for the Northern District of Illinois maintain that the schedule of rates of January 8, 1934, as supplemented by the schedule of March 12, 1934, as theretofore fixed by the Secretary of Agriculture, remained and were and are the lawful rates, notwithstanding the schedule of rates tendered to the Secretary October 19, 1935." (R. 27)

It is of no difference in actualities and in substance that the interlocutory injunction in terms restrains the Secre-

* Italics supplied here as elsewhere in this brief unless otherwise noted.

tary of Agriculture and the other defendants from interfering with the collection of charges scheduled on October 19, 1935 rather than in terms restraining the Secretary from enforcing his orders of January 8, 1934 and March 12, 1934. Either terminology would accomplish the same result, namely, restraining the Secretary from enforcing the specified and identified orders in accordance with the insistence and threats of the Secretary. In short, the schedule was filed; the Secretary insisted upon compliance with specific orders; the court enjoined the Secretary from enforcing those orders. No amount of verbiage can change that fact.

The letter of the Secretary of Agriculture to the Secretary of the Chicago Live Stock Exchange, in which the threats and insistence are made, is set forth verbatim in the petition (R. 10). The appellees alleged that the schedule of rates filed October 19, 1935 had superseded the rates prescribed by the orders of the Secretary. The prayer of the petition before the Statutory Court is

> "That upon the filing of this petition and bill and the convening of a properly constituted Court, that the Court grant an interlocutory injunction restraining and enjoining the defendants, and each of them, from enforcing or threatening to enforce the *orders* of the Secretary of Agriculture in Bureau of Animal Industry Docket 402"; (R. 13)

The prayer continues that the defendants be enjoined from interfering with the collection of the rates and charges specified in the schedule attached to the petition as Exhibit A (R. 13). There is no difference in essence between these alternative prayers. One is a negative statement, the other a positive statement. If the schedule filed was null and void, the orders of the Secretary could be enforced. If the schedule filed was lawful, the orders of the Secretary could not be enforced.

When litigants go to court because the Secretary insists

upon compliance with certain orders, and the litigants and the Statutory Court assert that those orders cannot be enforced, the suit is one to enjoin, set aside, annul or suspend an order.

The Statutory Court had jurisdiction over the subject matter of this cause since the action was one to restrain the Secretary from the enforcement of the orders of January 8, 1934 and March 12, 1934 in B. A. I. Docket No. 402.

The Contention of the Defendants in the District Court Was That the Orders of January 8, 1934 and March 12, 1934, Should Be Enforced.

The entire contention of the defendants before the Statutory Court was that the rates prescribed by the Secretary of Agriculture in 1934, by order, were still the lawful rates. The Court in summarizing the contentions of the defendants said: (R. 27)

> "On the other hand, the Secretary of Agriculture and the United States District Attorney for the Northern District of Illinois maintain that the schedule of rates of January 8, 1934, as supplemented by the schedule of March 12, 1934, as theretofore fixed by the Secretary of Agriculture, remained and were and are the lawful rates, notwithstanding the schedule of rates tendered to the Secretary October 19, 1935."

The Government's brief in the District Court is replete with defense of the orders of the Secretary of Agriculture in B. A. I. Docket 402. There are pointed out in the footnote on this page, instances of assertions in the Government's brief in the District Court showing that the Court's summary of the contention of the Government is entirely accurate.*

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*1. In its Statement of the Case, the defendants called to the attention of the court that the relief prayed was that the court "enjoin the defendants and each of them from enforcing the orders of the Secretary (which was upheld in the Acker case) and from interfering in any man-

The question in this suit, as the Government argued below, is whether when the new schedule was filed and published, did the earlier orders of the Secretary "remain and were and are the lawful rates" or whether the rates scheduled in the new tariff were the lawful rates. It makes no difference whether the proposition be put: Were the orders still in force? Or whether the proposition be put in this language: Was the newly filed schedule in force?

The Government now makes the contention that the letter of the Secretary returning the tariff to the market agencies (R. 10) was not an order such as could be enjoined, set aside, annulled or suspended. The appellees have not heretofore made, and do not now make the contention that the letter of the Secretary (R. 10) is an order. The letter threatened to enforce orders no longer enforcible; and hence the suit to restrain the enforcement of such orders.

The Argument of the Government That the Suit Is Not One to Enjoin the Enforcement of an Order Is Entirely Out of Harmony with the Government's Contention in the Second Section of Its Brief in This Court that the Published Schedule Is Illegal and Void Because It Contains Rates in Excess of Those Prescribed by Orders of the Secretary.

Under the heading "Questions Presented" the Government raises the point whether the rates of the schedule published October 19, 1935, can be lawfully collected

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ner, civil or criminal, with the collection of the rates and charges specified in the tariff published October 19, 1935" (Brief, p. 3).

2. "The orders of January 8, 1934 and March 12, 1934, pursuant to the authority of Section 310(b), expressly provided that petitioners should not publish, demand or collect any rates or charges in excess of the rates or charges prescribed" (Brief, p. 7).

3. "The fact that the orders of January 8, 1934 and March 12, 1934 were temporarily enjoined by this Court does not affect the validity of the above argument". (Brief, p. 7).

4. In the District Court, the defendants devoted an entire section of their brief to the argument that the tariff published on October 19, 1935 was illegal and void because rates had been prescribed by an order of the Secretary (Brief, p. 3, *et seq.*).

"notwithstanding that they exceed the maximum rates prescribed in the orders." (Brief, p. 3.)

Again, in its Statement of the Case, the Government refers to the refusal of the Secretary to retain the schedule of October 19, 1935, because

"he had prescribed a schedule of rates and charges",—

in other words, entered an order. (Brief, p. 5.)

In its Specification of Errors, the Government asserts that the appellees have no right to publish a schedule of rates and charges

"which does not comply with the order of the Secretary". (Brief, p. 11.)

In its Statement of Points to be relied upon (R. 34), the Government asserts that after rates have been

"prescribed by order of the Secretary",

they shall thereafter be observed, etc.

Again:

"rates prescribed shall continue in force until the further order of the Secretary".

And further,

"Inasmuch as the Secretary of Agriculture had prescribed maximum rates and charges by orders dated January 8, 1934, and March 12, 1934",

the schedule published was of no effect.

Nearly all of the assignments of Error (R. 30) are predicated upon the proposition that the orders of the Secretary of January 8, 1934 and March 12, 1934, are still in full force and effect. See particularly Assignments 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11.

The entire second section of the Government's Brief, covering some fifteen pages, is argument on the contention that the published schedule of rates of October 19, 1935 is void because contrary to

"rates prescribed by orders of the Secretary".

The entire substance of this lawsuit is whether the orders of the Secretary of January 8 and March 12, 1934, are still in effect. Whether such orders are in effect and enforcible depends upon the validity and lawfulness of the schedule filed on October 19, 1935. Or, stated conversely, whether the schedule filed is lawful and valid depends upon the present validity of the orders of the Secretary. The Statutory Court found the published schedule valid, lawful, and enforcible. Its injunctional order prevents the Secretary from enforcing his orders of January 8, 1934, and March 12, 1934, as prayed for in the petition.

The Secretary insisted upon the enforcement of orders no longer having any vitality. The appellees prayed that the Secretary's insistence and threats be restrained. The suit was one to enjoin the enforcement of an order.

III.

The Duties of the Appellee Market Agencies in Respect to the Filing of the Schedule of October 19, 1935, Were Performed Upon the Delivery of Such Schedule to the Secretary to Be Kept Upon File.

The arbitrary and unreasonable failure of the Secretary to perform his duty in retaining such schedule was a nugatory act. In this court for the first time, the Government contends that the schedule of rates published on October 19, 1935, was not filed with the Department of Agriculture. The Government's sole contention below was that the market agencies had no right to file a new schedule of rates. The fact of filing was not challenged. The assignments of error (R. 30) do not raise the question of the fact of filing. They challenge, as a matter of law, the right to file. But now the position taken is that the schedule of rates was not filed as a matter of fact. *The thing essential*

to a filing is the deposit of the paper with the proper officer with notice of the purpose and the intent that he should retain it. As we shall presently show *the fact that the paper is not retained by the official does not prejudice the rights of the party who has done all in his power to file the document.* That the official is derelict in his duty does not undo the act of filing.

The petition sets forth the ultimate facts in respect to the filing of the new schedule or tariff. The petition alleges that the schedule was prepared, published and submitted to the Secretary for filing in full and complete compliance with all provisions of Packers and Stockyards Act, 1921, and the General Rules and Regulations of the Secretary of Agriculture."* (Par. 13, R. 9.)

Lest the reference by the Government to Paragraph 13 of the petition leave the inference that the petition does not charge and assert that the tariff was filed, we quote from Paragraph 15 of the Petition:

> "15. The petitioners and plaintiffs allege that having made full compliance with the provisions of Packers and Stockyards Act, 1921, and with the General Rules and Regulations of the Secretary of Agriculture thereunder, in the publication and submission for filing of a schedule of just, reasonable, and non-discriminatory rates and charges, *the refusal of the Secretary to retain such schedule is void and of no effect and that such schedule is properly filed;* and that the duties of the plaintiff market agencies in respect to the filing of said schedule were performed upon the delivery of such schedule to the Secretary to be kept upon file and that the arbitrary and unreasonable failure of the Secretary to perform his duty in the retaining of such schedule is a nugatory act." (R. 11)

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* The affidavit of E. M. Hughes (R. 18) sets forth the concrete and specific facts in reference to the preparation, the posting, the publication, and the mailing of the schedule to the Department of Agriculture. No question is raised by the Government as to the proper posting and publication of the schedule; no question is raised as to the form, size and contents of the schedule: and no question is raised as to the compliance with the requirement of the Act that posting and publication must be at least 10 days before the effective date of the tariff. Consequently these questions are not discussed.

So the appellees do not contend, as the Government asserts (Brief, p. 36-7) that the schedule of rates was never actually filed. The Statutory Court found (R. 27) that the schedule of rates had been lawfully tendered to the Secretary of Agriculture and that the Secretary by arbitrarily refusing to do a ministerial act could not render the tendered schedule unlawful and ineffective.

The Government further contends that the ministerial act of the Secretary in keeping on file a schedule delivered to him is necessary in order that the public may know what the rates are; and second, that administrative officials may know what the rates are. This contention goes much further than the Packers and Stockyards Act warrants. The Act provides in Section 306 (a), Section 207 U. S. Code, that market agencies

> "shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges."

Sub-section (c) provides:

> "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the Public filed and published as aforesaid."

Applying those provisions, the public has due notice of rates by the requirement that they be posted in the stockyards. The Secretary is given power under the Act to prescribe the form and manner in which schedules shall be prepared and arranged and posted. No complaint is made by the Government that all requirements of the Secretary were not complied with. Indeed, the Hughes affidavit (R. 18) states that the schedule in question was posted on October 17, 1935, upon the bulletin board of the Live Stock Exchange Building; that a printed copy was posted at the same time in the office of the Secretary of the Live Stock Exchange, that these places are conspicuous public places;

that, in addition, each market agency posted the schedule in his or its office. The provisions of the Act and of the regulations of the Secretary that the market agencies should print and keep open to public inspection (and it is not denied that this was done) fully apprise the public of what the rates are. Live stock shippers do not go to Washington to the office of the Secretary to determine what rates are charged; they go to the stockyards to which they send their live stock. *The purpose of filing is to give the Secretary notice. This he got.*

As to the Government's contention that the Secretary must know what the rates are—the Secretary does know. The schedule was delivered to and received by him and he acknowledged receipt thereof (R. 10). He cannot now contend that his arbitrary refusal to retain the schedule renders it impossible for him to administer the Packers and Stockyards Act.

The Government states (Brief, p. 38) that at the very heart of the act is the requirement that rates to be effective must actually be on file with the Secretary. That official cannot, by rejecting a schedule or depositing it in his wastebasket, contend that it was not filed. If, as the Government contends, the schedule must be on file, and that this requirement is

"the very heart of the Act,"

the Secretary cannot cut out the heart and then complain of his own operation.

The Failure of an Officer to Perform His Ministerial Duty When a Paper Is Delivered for Filing, Does Not Render Ineffective the Filing.

The original schedule of rates, properly subscribed by the market agencies, was delivered to the Department of Agriculture and received on October 19, 1935. (R. 19). In

his letter of October 26, 1935 (R. 10) the Secretary acknowledged the receipt of the schedule. The Secretary returned the schedule to the market agencies with the same letter (R. 10).

The duty of a party desiring to file a paper is performed with its delivery to the proper officer to be kept on file and the failure of the officer to perform his duty does not prejudice the rights of the parties.

In *Blair* v. *Cleveland C. C. & St. L. Ry. Co.*, 45 F. (2) 792, affirmed 59 F. (2) 478 (C. C. A. 7) a similar question was involved. The pertinent facts and rulings of the Court appear in the following quotation from p. 794 of 45 F. (2), the Circuit Court of Appeals adopting the same language.

> "Defendants allege also that the complaint was not filed with the Commission until the 16th day of December, 1925, beyond the time provided by the statute for filing of such complaints, and therefore came too late. However, the evidence shows that the complaint was originally received by the Commission on November 25, 1924, and remained with that Commission thereafter. *Whether the petition was then marked filed or not is immaterial; it had been deposited with the Commission, and the failure of any administrative officer to mark the same as filed does not prevent the depositing of the same with the Commission from tolling the limitations of the statute.* In *State National Bank* v. *Lowenstein*, 52 Okl. 259, 155 P. 1127, the Supreme Court of Oklahoma said that the date of filing papers is the date of depositing same with the proper custodian, and not the date they are marked filed. The filing is the actual delivery to the clerk without any regard to any action he may take."

In *Re Von Borcke*, 94 F. 352, it was held that a petition in bankruptcy is filed when it is delivered to the clerk of the bankruptcy court. The Court said:

> "It is beyond dispute that the clerk was the proper officer to receive the petition, and there is no denial of the fact that it was delivered to, and received by, him for the purpose of being kept on file. *'A paper is said*

> *to be on file when it is delivered to the proper officer to be kept on file.'* 7 Am. & Eng. Enc. Law, p. 960. The test of filing seems to be whether the officer in whose custody the paper is placed is the one entitled to retain the same."

In *Baker* v. *Reeves*, 9 N. J. Misc. 1303, 157 Atl. 174 (Supreme Court, New Jersey), a borough clerk refused to file or to mark filed a petition for election when that petition was presented. It was held that the petition was filed upon presentation, the court saying:

> "The question to be decided largely hinges on when the petition was filed. The clerk admits he received it on December 22d, but says he did not file it because he was required to investigate and satisfy himself of its validity before filing. We think the petition was filed when originally presented on December 22d. *The clerk may not have marked the petition filed but the petitioners filed it with him.*"

A similar ruling was made by the Supreme Court of Texas in *Hanover Fire Insurance Company* v. *Shrader & Rogers*, 89 Tex. 35, 33 S. W. 112, 30 L. R. A. 498, the court saying:

> "Where a paper is deposited with the Clerk of a Court for the purpose of making it a part of the records in the case, it is filed."

Further authority is found in *Gallagher* v. *Linwood*, 30 N. Mex. 211, 231 Pac. 627, 37 A. L. R. 664, in the following statement:

> "*The duty of the party desiring to file a paper is performed with its delivery to the proper officer, to be kept on file, and the failure of the officer to perform the duty does not prejudice the rights of the parties.* Neither does the withdrawal of a paper after it has once been filed cancel or render ineffective the previous filing. * * *"

In *Yates* v. *Tatum*, 60 Colo. 484, 155 P. 328, 329, the Court said:

> "The essential thing to a filing is a deposit of the

paper with the officer, with notice of the purpose and intent that he should retain it."

Again, in *Gove* v. *Armstrong*, 87 Vt. 468, 89 Atl. 868, 869, the Court said:

> "The filing party is entitled to the benefit of his act when he places the document in the custody and control of the proper officer for the purpose of filing."

In *Edwards* v. *Grand*, 121 Cal. 254, 256, 53 P. 796, the Court said:

> "An instrument is filed for record when it is deposited in the proper office with the person in charge thereof, with directions to record it."*

The Government does not distinguish between the act of the party in delivering the paper to the officer for keeping and the act of the officer in putting up the paper. When an officer is bound to keep a paper on file, the party duly filing it is not prejudiced by any wrongful act of the office after the paper is delivered. In addition to the cases cited above, we refer to others in a footnote.**

A paper is filed when it is delivered to the proper officer. It is not the clerical act of endorsing or recording or putting away the paper that is the filing but its receipt by the proper officer that constitutes a filing. It was the duty of the Secretary, upon the delivery to him of the proposed

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* We refer briefly in this footnote to definitions of the words "file", "filed" and "filing".

1. To deposit. *Harrison* v. *Clifton*, 75 Ia. 736, 740; 38 N. W. 406.
2. To deposit papers in official custody. Abbott Law Dictionary, citing many cases.
3. To deposit with the proper custodian for keeping. *In re DeWar*, 10 Mont. 426, 437, 25 P. 1026.
4. Delivered into the actual custody of the officer designated by the statute to be kept by him as a permanent record. *Norris* v. *Cross*, 25 Okl. 287, 296; 105 Pac. 1000.

** *Marlet* v. *Hinman*, 77 Wis. 136, 45 N. W. 953. A mortgage is still filed though lost or wrongfully withdrawn after delivery to the officer.

Pool v. *Poindexter*, 72 Kas. 654, 83 P. 126. A referee's report was filed on time even though after filing it was withdrawn to have it bound.

Spackman v. *Gross*, 25 S. Dak. 244, 126 N. W. 389. Wrongful removal after due filing does not affect the filing as in contemplation of law the notice is on file and in the custody of the officer.

schedule for filing, to keep and retain it. His unjustifiable action in returning the schedule and in refusing to consider it filed was nugatory. The schedule is filed in full compliance with the law. The Secretary's neglect of his duty does not prejudice the rights of the appellees.

Not a single authority is cited by the Government in opposition to appellees' contention that the refusal of the Secretary to retain the schedule delivered to him for filing was a nugatory act.

When a paper is delivered to the proper officer to be kept on file, it is in legal contemplation filed even though the officer is derelict in his duties. The exercise in sophomoric dialectics indulged in by the Government to prove that the schedule was neither filed nor on file misses the point at issue. The appellees contend that the schedule was filed and that their rights are not prejudiced by the failure of the Secretary to keep it on file. In legal contemplation that schedule has at all times been in the legal possession and custody of the Secretary of Agriculture and is on file in the Department of Agriculture. The Secretary of Agriculture, broad though his powers may be, cannot repeal a statute or render it of no vitality by the rejection of documents which he is obligated to receive and to retain.

The Packers and Stockyards Act permits the Secretary of Agriculture to reject and refuse to file a schedule tendered to him for filing only upon one condition which is expressed in Section 306(d), namely, that the schedule

> "does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful."

The Secretary did not reject the schedule on this ground but upon the ground that having once spoken in respect to rates, those rates must endure forever until he chose to speak again, if ever, regardless of changed conditions; and

upon the ground that litigation was pending over the validity of previous orders.

The cases cited both by the Government and by the appellees indicate that depending upon the surrounding facts and circumstances "filing" may mean either an act of a party in delivering a document to an official or delivery to an official followed by an act of the official placing the document "on file". The Government contends that as used in the Packers and Stockyards Act the latter meaning is intended, on the theory that the rates are to be filed not only to give notice to the Secretary, but also in order that the public may at any time know what the rates are. As has been pointed out hereinbefore, the statute makes specific provision for the public by requiring the market agencies to "keep open to public inspection at the stockyards" schedules showing the rates. The rates are filed with the Secretary in order that he may have notice of them. In such circumstances, a provision that notice be filed uses "filed" in the sense of delivered or deposited. However, even were the Act construed to require more than a deposit, the Secretary cannot assert as a defense to this suit his own wrongful act in failure to perform his duty.

The Government cites and quotes from the case of *United States* v. *Lombardo*, 241 U. S. 73 (p. 38). That case concerned the venue of a criminal prosecution under a federal statute making it a crime for the harborer of alien women to fail to file with the Commissioner General of Immigration the statement concerning such women called for by the Act. It was held that violations are committed in the District of Columbia where that official has his office and are not justiciable elsewhere on the theory that the failure to deposit the statement in the mail is the beginning of a continuing defense, since mailing is not filing. This accounts for the language employed by the Court and cited

by the Government. Obviously mere mailing is not filing. There must be delivery also.

The quotation from the *Lombardo* case abruptly terminated by the Government in its Brief (p. 38) continues:

> "Anything short of delivery would leave the filing a disputable fact."

Here there is no dispute. The schedule was received; and its receipt was acknowledged (R. 10).

From a reading of the entire opinion in the *Lombardo* case, it is clear that the holding in respect to filing means to deliver to the office indicated and to send to such office through the mail. Indeed the case is frequently cited on that exact proposition. The same question arises in relation to the filing of false income tax returns. It is held in such cases that the filing takes place upon the delivery at the office of the official required to receive it, and not in the jurisdiction where the return was mailed.*

The Government cites *United States* v. *Van Duzee*, 185 U. S. 278 (p. 38). In that case the Court does recognize a distinction between "deposit" and "filing." That distinction is not pertinent in the instant case but was in the *Van Duzee* case for the statute said "deposit"; and the Clerk with whom the deposit was made wanted a fee for "filing."

The question in *United States* v. *Davidson*, 285 F. 661 cited by the Government, page 38, involved prosecution for the removal of books "filed or deposited" with a public officer. It was held that the words are not synonymous. The decision is immaterial on any point in this case.

In *Edward Sales Co.* v. *Harris Structural Steel Co.*, 17

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* 1. *U. S.* v. *Hill, Warden*, 8 F. Supp. 469 (D. C. Pa.), aff'd. 74 F. (2) 940.

2. *Wampler* v. *Snyder, Marshall*, 66 F. (2) 195 (Ct. App. D. C.). "The filing takes place upon delivery at the office of the official required to be receive it" (196).

3. *Berlin* v. *Commissioner*, 59 F. (2) 996 (C. C. A. 2). Mailing alone is insufficient; there must also be receipt.

4. *U. S.* v. *Commerford*, 64 F. (2) 28 (C. C. A. 2).

F. (2) 155 (Government's Brief, p. 39), a foreign corporation after executing a power of attorney, instructed the Secretary of State not to accept such paper for filing. There was no intention on the part of the deliverer of the papers to have them filed. As the Court said:

> "The progress of the paper was stopped at the door of the secretary's office."

In *Lewis-Hall Iron Works* v. *Blair*, 23 F. (2) 972 (Government's Brief, p. 39), the question was whether a document had been filed in time, not whether it was filed. The language from this case quoted by the Government in its brief is not the language of the Federal Court but the language of the New York state court in reference to a particular New York statute.

The *Gubelman* case, 10 F. (2) 926, referred to in the Government's Brief at p. 40, concerned the question whether a petition in bankruptcy is filed by presenting the petition to the judge rather than by delivery to the Clerk, the latter being the officer designated by the statute to receive and keep the records of the court. It was held:

> "A paper in a case is not filed until it is deposited with the clerk of the court, for the purpose of making it a part of the records of the case."

This is precisely what was done in the instant case, the paper was filed with the proper officer for the purpose of making it a permanent record.

The state cases cited in the Government's brief (p. 40) are not pertinent. Those decisions deal with the effect of presenting a paper and its immediate withdrawal by the same party. For instance in *Chapin* v. *Kingsbury*, 135 Mass. 580, it was held that it was not a filing for a person to present a certificate to a clerk and thereafter withdraw it and keep it in his own possession.

Not a single authority is presented by the Government meeting the appellees' contention on the nub of this phase

of the controversy: The schedule was delivered; the Secretary's act in returning it was nugatory and did not render ineffective the delivery; in legal contemplation the schedule was and is filed.

The appellees performed their duty under the statute. The Secretary failed in his duty. To the prejudice of the appellees, he would now take advantage of his own remission.

Conclusion.

Under the Packers and Stockyards Act, market agencies are the primary rate makers. Their initiation of a new or amended rate schedule by filing and posting is subject to the regulatory power of the Secretary of Agriculture to suspend the operation of such schedule before its effective date, for a limited period of time, in order that a hearing may be had and a determination made of the reasonableness of the rates and charges of the schedule. The Secretary cannot refuse to retain a schedule delivered to him to give him the notice required by the Act, and then contend that the schedule is not filed.

Unless the new schedule is suspended by the order of the Secretary under the powers conferred upon him by the Packers and Stockyards Act, that schedule goes into effect by operation of law and the rates and charges prescribed are lawful and valid.

The fact that the Secretary of Agriculture had previously acted to fix rates and charges does not thereafter deprive the market agencies of the right to initiate and file lawful rates for their services in the manner provided by the Act, subject to their temporary suspension by the Secretary and to being permanently superseded by the Secretary in the manner and form prescribed by the Act.

The rejection of the schedule by the Secretary was arbitrary and unreasonable. The grounds asserted by him for his rejection that litigation was pending and that no new rates could be initiated because of his previous orders are not authorized under the Packers and Stockyards Act.

The suit was one to restrain the enforcement of the orders of the Secretary. Consequently the District Court had jurisdiction over the subject matter of this litigation and the power to enter the order for interlocutory injunction.

It is submitted that the District Court should be affirmed.

Respectfully,

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Counsel for Appellees.

APPENDIX A.

The petition filed in the District Court alleged in paragraph 10 (R. 6) that the schedule of rates and charges prescribed by the Secretary's order of January 8, 1934, and his supplemental order of March 12, 1934, were the result of an investigation of costs, volume of business and receipts for the years 1931 and 1932; and that subsequent to those years, subsequent to the orders of the Secretary, and subsequent to the hearing and decree of the District Court in the *Acker* case, the receipts of live stock at the Chicago yards had decreased in volume until, for example, the receipts in August, 1935 were the lowest of any August since the year 1882. It was further charged that changed economic conditions, the decrease in volume of live stock, and the decreased volume of receipts had caused such losses and created such hardship that the petitioners were compelled in self-preservation to file and publish a new schedule of rates effective November 1, 1935.

It is further alleged in paragraph 11 of the petition (R. 6, *et seq.*) that the Secretary refused to act in the premises, although two petitions for rehearing had been filed, because of the pending litigation over the Secretary's orders of January 8, 1934 and March 12, 1934.

The Government in the District Court did not deny any of the allegations of the petition. It based its defense to the application for a restraining order solely upon the ground that the market agencies had no right under the law to establish a new set of rates. The Secretary had previously denied any relief on the ground that litigation was pending over a previous rate order (Letter of September 30, 1935, R. 8).

To show the effect upon the business of the market

agencies caused by changed and changing conditions, to show the decreased volume of live stock, and to show that a rate order based upon evidence of the years 1931 and 1932 is entirely inadequate in 1935 and 1936—all of which the Secretary has consistently refused to consider—we refer to publications of the Department of Agriculture.

Senate Document, Seventy-Third Congress, Second Session, No. 140, entitled "Emergency Hog Marketing Program," dated February 21, 1934, shows in tabular form that as of January 15, 1934 (one week after the entry of the Order in the *Acker* case), 6,410,866 pigs, sows and inedible little pigs had been killed as a result of the Emergency Hog Marketing Program.

We quote further from page 42 of the same publication:

> "The sale of extra pigs, on the basis of the difference between their weight at the time of emergency sale and the average weight to which hogs are fed, should mean a reduction of approximately 400,000,000 pounds in the future supplies. The sale of approximately 770,000 more sows, however, would have meant a potential decrease in market supplies next summer of approximately 850,000,000 pounds of live hogs. This is because the sale of each sow would have removed from fall farrowings approximately five pigs, which under normal circumstances, are fed to an average market weight of about 225 pounds. Whereas the original expected decrease in future market supplies was between 1,500,000,000 and 1,800,000,000, the actual reduction as a result of the program will be in the neighborhood of 1,000,000,000 to 1,200,000,000 pounds."

In November, 1935, the United States Department of Agriculture issued its miscellaneous publication No. 235, entitled "The Agricultural Outlook for 1936." Without comment we quote from this bulletin. Under the heading "Meat Animals and Meats" and the sub-head "Supplies," the following is found:

> "The supply of meat animals on farms in terms of

the total live weight of the three species at the beginning of 1936 probably will not be greatly different from a year earlier, *when the aggregate supply was estimated to be the smallest in more than 30 years.* With none of these species is there any present certainty as to whether numbers on January 1, 1936, will be larger or smaller than a year earlier, and with none of them is the change, either upward or downward, expected to be large. It seems probable, however, that a considerable increase in the number of hogs on farms will occur during 1936 and some increase in cattle numbers next year is also probable.

From 1928 to the beginning of 1934 the trend in the number of meat animals was upward. The increase during this period in terms of total live weight was about 12 per cent. Most of this increase was eliminated in 1934, largely as a result of the severe drought. The number of cattle on farms increased steadily from 1928 to early 1934 with the increase in numbers from January 1, 1928, to January 1, 1934, amounting to 11,600,000 head, or 20 per cent. By the beginning of 1935, however, cattle numbers were about 7,600,000 smaller than at the beginning of 1934. Thus, more than three-fifths of the increase occurring in the 5 years 1928-34 was eliminated by the beginning of 1935. Hog production (number of pigs raised) decreased from 1928 to 1930 and increased sharply in 1931 with little change in 1932 or 1933. Partly as a result of the 1934 drought and the resulting shortage of feed grains and partly as a result of the low corn-hog price ratio prevailing from the middle of 1933 to early 1934, the number of pigs produced in 1934 was 35 per cent smaller than in 1933 and was the smallest number produced in many years. *The number of hogs on farms at the beginning of 1935 was the smallest in 50 years.* Sheep numbers increased steadily from 1923 to 1932, the increase amounting to about 17,000,000 head, or 45 per cent. From 1932 to 1934, sheep numbers declined slightly but the number on January 1, 1935, was about 5 per cent smaller than a year earlier and was the smallest since 1929'' (pp. 53 & 54).

Further, under the same heading, the following is found:

''The net results of these different factors influencing livestock production probably will be to per-

petuate a situation caused temporarily by the 1934 drought; that is, to decrease somewhat the proportion of livestock production from the area covering the Great Plains and westward and to increase the proportion in the area east of the Mississippi River and including the East North Central, East South Central, and South Atlantic States" (pp. 54-55).

Under the heading "Hogs—Domestic Supplies," we quote as follows:

> *"Although federally inspected slaughter of hogs during the 1934-35 marketing year, totalling 30,678,000 head, was the smallest in 25 years, it is expected that slaughter in the 1935-36 marketing year will be even smaller.* The 1935 spring pig crop was estimated by the Department of Agriculture at 30,402,000 head for the United States. This is a decrease of 7,405,000 head, or 19.6 per cent, from the spring pig crop of 1934 and a decrease of 20,814,000, or 40 per cent, from the average of the spring crops of 1932 and 1933. *In the North Central (Corn Belt) States the spring crop this year was 22.3 per cent smaller than that of 1934 and 42 per cent below the 1932-33 average.*
>
> "The number of sows to farrow in the fall season of 1935 was estimated in the June pig crop report at 3,175,000 head. This is an increase of 19.5 per cent over the very small number farrowed in the fall of 1934, but is 34 per cent smaller than the average of 1932 and 1933. The total number of litters, spring and fall, to be farrowed in 1935 was indicated in the June pig crop report to be about 8,196,000. This is a reduction of more than 10 per cent from the total of 1934 and of 41 per cent from the average of 1932 and 1933. For the Corn Belt States the reduction in total litters in 1935 is 12 per cent from 1934 and 44 per cent from the average of 1932 and 1933. If the average number of pigs saved per litter in the fall of 1935 is as much above the fall of 1934 as the spring of 1935 was over the spring of 1934, the total number of pigs saved in 1935 will be less than 50,000,000 head. This would be about 4,000,000 head less than the total number of pigs saved in 1934 and more than 31,000,000 head less than the average of 1932 and 1933. *Inspected slaughter in the marketing year 1935-36 from such a*

production probably will total between 27,000,000 and 28,500,000 head, and be the smallest since the year 1909-10" (p. 56).

Further, under the subject "Hogs—Production Outlook," the following is found:

"The end of the downward trend in hog production which began in the fall season of 1933 apparently was reached with the small spring-pig crop of 1935, and increasing production can be expected during 1936 and 1937. *How rapidly hog production will increase during the next 2 years is uncertain, since there are no other periods in which the decrease in production was so great as it was in 1934 and 1935.* The nearest comparable situations to the present were those from 1908 to 1912 and from 1891 to 1896. Inspected slaughter for the marketing years 1909-10 (pig crops of 1909) decreased 7,500,000 head, or about 21 per cent, from the previous year. Hog prices in 1910 advanced sharply and the 1910 pig crop, especially the fall crop, increased markedly. Inspected slaughter for the 1910-11 marketing year increased about 4,000,000 head and in the 1911-12 year was back about to the 1908-09 level.

"Between the marketing years 1891-92 and 1892-93 the estimated inspected slaughter equivalent decreased about 6,500,000 head, or 27 per cent, and it was not until the marketing year 1895-96 that it again reached the 1891-92 level. During that period, the 1894 drought occurred—probably the most severe ever known in this country with the exception of the one in 1934—and this doubtless tended to keep production from increasing more rapidly. In that period the drought occurred in the second year after production had been greatly reduced, whereas in the present period it occurred in the same year. The decrease in federally inspected slaughter for the 1934-35 year from 1933-34 amounted to 13,200,000 head, or 30 per cent. If allowance were made for the pigs bought by the Government and slaughtered in August, 1933 from the 1933 pig crop, the decrease was about 39 per cent. Slaughter in the marketing year 1935-36 is expected to be about 5 to 10 per cent smaller than that in 1934-35. *No such reduction, either in numbers or in percentages as has taken place in the last 2 years, has ever before oc-*

curred and how rapidly a recovery can be made is very uncertain" (p. 59).

Under the subject "Beef Cattle—Supplies," the bulletin states as follows:

"The number of cattle on farms January 1, 1935, was 60,557,000 head, according to the estimate of the United States Department of Agriculture. This was 7,623,000 head, or 11.2 per cent, less than the number January 1, 1934, but was about 3,000,000 head more than on January 1, 1928, the last low point of the cattle-number cycle. Compared with 1928, however, all of the increase was in the number of cattle kept principally for milk (cows, heifers, and heifer calves) and there was a small decrease in the number of other cattle, mostly cattle kept principally for beef. Compared with January 1, 1934, there were reductions of 2,221,000 head, or 6 per cent in milk stock and 5,402,000 head, or 17 per cent, in other cattle.

"The decrease in cattle numbers during 1934 was larger than during any year of record. It was largely a result of the severe drought which extended over most of the country west of the Mississippi River and of the purchase and slaughter of cattle and calves as a part of the drought-relief activities of the Federal Government. Had there been no drought, it is probable that some decrease in cattle numbers would have occurred in 1934, but if feed production had been fairly normal the reduction would have been relatively small. *With no abnormal conditions, such as wide-spread feed shortage or production-control plans, cattle numbers would have declined for some years and another low point in numbers would have been reached in about 1939 or 1940. Most of the decrease that would have normally extended over the following 5 or 6 years therefore occurred in 1934"* (pp. 60-61).

* * * * * *

" * * * * Cattle marketings from all the West North Central States, except Kansas, during the first half of the year were sharply below those of the first half of 1934 and the marketings from most of the Western States were relatively small, except from California" (p. 62).

* * * * * *

" * * * * *Receipts of beef steers at Chicago during the first 9 months of 1935 were much the smallest for those months in the 14 years of record, being nearly 30 per cent smaller than in 1934 and 34 per cent smaller than the average of the preceding 5 years.*

The number of cattle on feed in the Corn Belt States on August 1 was estimated as about 30 per cent smaller than a year earlier and the smallest for that date in many years" (p. 62).

Under the subject "Sheep and Lambs—Supplies," the bulletin has the following information:

"According to the estimate of the department of Agriculture, the 1935 lamb crop of 27,630,000 head was the smallest since 1929. It was 7 per cent, or 2,030,000 head, smaller than the 1934 crop and 4,600,000 head smaller than the record crop of 1931. The decrease from 1934 was all in the western sheep States since the native-lamb crop of 1935 was somewhat larger than that of 1934. Although the number of breeding ewes on January 1, 1935, in the native-sheep States was 2 per cent smaller than a year earlier, the number of lambs saved per 100 ewes (the percentage lamb crop) in 1935 was enough larger than in 1934 to more than offset this decrease in ewes. The native-lamb crop of 1935 was practically the same as the average native-lamb crop for the 5 years 1930 to 1934.

"The 1935 lamb crop in the western sheep States was the smallest since 1927, being 11 per cent, or 2,070,000 head smaller than the 1934 crop. The number of breeding ewes January 1, 1935, was 7 per cent smaller than a year earlier and the percentage lamb crop was the smallest in the 14 years for which records are available, being 70.3 compared with 73.8 in 1934 and 78.2 the average from 1925 to 1934. The crop of 1935 was smaller than that of 1934 in all of the Western States, except California and New Mexico. The decreases from last year were relatively the largest in the late-lambing States and all of the decrease from last year was in late lambs, as the early-lamb crop (which covers lambs dropped before Mar. 15) was but little different from last year.

"The small western lamb crop this year was a result of the 1934 drought. The reduction in breeding

ewes was related directly to the drought through the relief activities of the Federal Government under which some 3,450,000 ewes were bought in the Western States in the late months of 1934. Because of the very bad range conditions during the summer and fall of 1934, ewes in nearly all of the western sheep States were in poor condition at breeding time and the number of dry ewes this spring was relatively large. Death losses of ewes, although rather heavy in some States, were only about average for the western area as a whole. The favorable weather during most of the winter and early spring tended to offset the shortage of feed and the poor condition of ewes at the beginning of the winter. Weather conditions during lambing were about average, but there were above-average losses of lambs in some States as a result of the cold, wet weather in May and early June and because of the lateness of new grass.

"Although the lamb crop of 1935 was materially smaller than that of 1934, the slaughter of 1935 lambs during the first 5 months of the 1935-36 marketing year (May 1, 1935, to Apr. 30, 1936) was considerably larger than during the first 5 months of the 1934-35 year. Inspected slaughter during the 5 months this year of 7,765,000 head was 962,000 head, or 12½ per cent larger ord. *This heavy slaughter during the first half of the marketing year, in view of the smaller lamb crop, indicates a reduction in the slaughter supply during the remainder of the year relatively much greater than the reduction in the size of the lamb crop*" (pp. 66-67).

APPENDIX B.

Packers and Stockyards Act, 1921 (Provisions of Act relating to Stockyards and stockyard dealers). U. S. C. Title 7.

STOCKYARDS AND STOCKYARDS DEALERS.

§ 201. (301) "Stockyard owners"; "stockyard services"; "market agency"; "dealer"; defined. When used in this chapter—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling in commerce, of livestock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce livestock at a stockyard on a commission basis or (2) furnishing stockyards services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser. (Aug. 15, 1921, c. 64, § 301, 42 Stat. 163.).

§ 202. (302) "Stockyard" defined; determination by Secretary as to particular yard. (a) When used in sections 201 to 217, inclusive, of this chapter the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. Sections 201 to 217 inclusive of this chapter shall not apply to a stockyard of which the area normally available for handling

livestock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of sections 201 to 217 inclusive of this chapter until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition. (Aug. 15, 1921, c. 64, § 302, 42 Stat. 163.)

§ 203. (303) Registration of stockyard dealer or market agency; penalty for failure to register. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this chapter by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States. (Aug. 15, 1921, c. 64, § 303, 42 Stat. 163.)

§ 204. Bond and suspension of registrants. The Secretary of Agriculture may require reasonable bonds from every market agency and dealer, under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing the Secretary finds any registrant is insolvent or has violated any provision of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the

Secretary of Agriculture or a court of competent jurisdiction. (Feb. 10, 1925, c. 200, 43 Stat. 851.)

§ 205. (304) General duty as to services. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard. (Aug. 15, 1921, c. 64, § 304, 42 Stat. 164.)

§ 206. (305) Rates and charges generally; discrimination. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and non-discriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, § 305, 42 Stat. 164.)

§ 207. (306) Schedule of rates; filing and exhibition; change in rates; suspension; penalties. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 202 of this chapter, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary and to the Public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good

cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may, either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If any such hearing cannot be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the

Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on patronage basis, its excess earnings on their livestock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both. (Aug. 15, 1921, c. 64, § 306, 42 Stat. 164.)

§ 208. (307) Unreasonable or discriminatory practices generally. It shall be the duty of every stockyard owner and market agency to establish, observe, an enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful. (Aug. 15, 1921, c. 64, § 307, 42 Stat. 165.)

§ 209. (308) Liability to individuals for violations; enforcement generally. (a) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 205, 206, 207, or 208 of this chapter, or any order of the Secretary made under sections 201 to 217 inclusive of this chapter, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 210 of this chapter, or (2) by suit in any district court of

the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies. (Aug. 15, 1921, c. 64, § 308, 42 Stat. 165.)

§ 210. (309) Proceedings before Secretary for violations generally, action to enforce order of Secretary. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 205, 206, 207, or 208 of this chapter, or of an order of the Secretary made under sections 201 to 217 inclusive of this chapter, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provisions of sections 201 to 217 inclusive of this chapter, or concerning which any question may arise under any of the provisions of sections 201 to 217 inclusive of this chapter, or relating to the enforcement of any

of the provisions of sections 201 to 217 inclusive of this chapter. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (Aug. 15, 1921, c. 64, § 309, 42 Stat. 165.)

§ 211. (310) Order of Secretary as to charges or practices; prescribing rates and practices generally. Whenever after full hearing upon a complaint made as provided in section 210 of this chapter, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion

that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services; is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed. (Aug. 15, 1921, c. 64, § 310, 42 Stat. 166.)

§ 212. (311) Prescribing rates and practices to prevent discrimination between intrastate and interstate commerce. Whenever in any investigation under the provisions of sections 210 to 217 inclusive of this chapter, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of livestock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in livestock on the one hand and interstate or foreign commerce in livestock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in livestock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such

manner as, in his judgment, will remove such advantage, preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding. (Aug. 15, 1921, c. 64, § 311, 42 Stat. 167.)

§ 213. (312) Prevention of unfair, discriminatory, or deceptive practices. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of livestock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist. (Aug. 15, 1921, c. 64, § 312, 42 Stat. 167.)

§214. (313) When orders effective generally. Except as otherwise provided in this chapter all orders of the Secretary under sections 201 to 217 inclusive of this chapter, other than orders for the payment of money, shall take effect within such reasonable time not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction. (Aug. 15, 1921, c. 64, § 313, 42 Stat. 167.)

§ 215. (314) Failure to obey orders generally; punishment. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 211, 212, or 213 of this chapter shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing viola-

tion each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. (Aug. 15, 1921, c. 64, § 314, 42 Stat. 167.)

§ 216. (315) Court proceedings to enforce orders; injunction. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same. (Aug. 15, 1921, c. 64, § 315, 42 Stat. 167.)

§ 217. (316) Proceedings for suspension of orders. For the purposes of sections 201 to 217 inclusive of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of sections 201 to 217 inclusive of this chapter, and to any person subject to the provisions of sections 201 to 217 inclusive of this chapter. (Aug. 15, 1921, c. 64, § 316, 42 Stat. 168.)

APPENDIX C.

Provisions of statutes relating to venue, jurisdiction and appeal (from U. S. Code, Title 28).

§ 43. Venue of suits relating to orders of Interstate Commerce Commission. The venue of any suit brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In case such transportation relates to a through shipment the term "destination" shall be construed as meaning final destination of such shipment. (Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 44. Procedure in certain cases under interstate commerce laws; service of processes of court. The procedure in the district courts (a) in respect to cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money shall be as provided in sections 45, 45a, 47a, and 48 of this title and (b) in respect to cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission shall be as provided in sections 45, 45a, 46, 47, 47a and 48 of this title. The orders, writs, and processes of the district courts may in the cases specified in this section and in the cases and proceedings under sections 20, 43 and 49 of Title 49, run, be served, and be returnable anywhere in the United States. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

§ 45. (Judicial Code, section 209.) District courts; practice and procedure in certain cases. The jurisdiction of the district courts of the cases specified in section 44 of this title, and of the cases and proceedings under sections 20, 43 and 49 of Title 49, shall be invoked by filing in the office of the clerk of the court a written petition setting forth briefly and succinctly the facts constituting the petitioner's cause of action, and specifying the relief sought. A copy of such petition shall be forthwith served by the marshal or a deputy marshal of the district court or by the proper United States marshal or deputy marshal upon every defendant therein named, and when the United States is a party defendant, the service shall be made by filing a copy of said petition in the office of the Secretary of the Interstate Commerce Commission and in the Department of Justice. Within thirty days after the petition is served, unless that time is extended by order of the court or a judge thereof, an answer to the petition shall be filed in the clerk's office and a copy thereof mailed to the petitioner's attorney, which answer shall briefly and categorically respond to the allegations of the petition. No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed. In case no answer shall be filed as provided herein the petitioner may apply to the court on notice for such relief as may be proper upon the facts alleged in the petition. The court may, by rule, prescribe the method of taking evidence in cases pending in said court. (June 18, 1910, c. 309, § 1, 36 Stat. 539; Mar. 3, 1911, c. 231, § 209, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 46. (Judicial Code, section 208.) Suits to enjoin orders of Interstate Commerce Commission to be against United States. Suits to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall be brought in the district court against the United States. The pendency of such suit shall not of itself stay or suspend the operation of the order of the Interstate Commerce Commission; but the court, in its discretion, may restrain or suspend, in whole or in

part, the operation of the commission's order pending the final hearing and determination of the suit. (June 18, 1910, c. 309, § 3, 36 Stat. 542; Mar. 3, 1911, c. 231, § 208, 36 Stat. 1149; Oct. 22, 1913, c. 32, 38 Stat. 219.)

§ 47. Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the United States, and to such other persons as may be defendants in the suit: Provided, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or in part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be

given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)

§ 47a. (Judicial Code, section 210.) Appeal to Supreme Court from final decree; time for taking; priority. A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such cases the notice required shall be served upon the defendants in the case and upon the attorney general of the State. The district court may direct the original record instead of a transcript thereof to be transmitted on appeal. The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title. Appeal to the Supreme Court, however, shall in no case supersede or stay the judgment or decree of the district court appealed from, unless the Supreme Court or a justice thereof shall so direct, and appellant shall give bond in such form and of such amount as the Supreme Court, or the justice of the court allowing the stay, may require. Appeals to the Supreme Court under this section and section 47 of this title shall have priority in hearing and determination over all other causes except criminal causes in that court. (Mar. 3, 1911, c. 231, § 210, 36 Stat. 1150; Oct. 22, 1913, c. 32, 38 Stat. 220.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 656

UNITED STATES OF AMERICA, ET AL.,
Appellants,

vs.

J. M. CORRICK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

PETITION FOR REHEARING.

GEO. I. HAIGHT,
Counsel for Petitioners.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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PETITION FOR REHEARING.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Now come the Appellees, and present this, their petition for a rehearing of the above entitled cause and, in support thereof, respectfully show:

This case was decided May 18, 1936. It involves an interlocutory injunction granted by the specially constituted District Court against the Secretary of Agriculture and others upon the bill of complaint of certain market agencies at the Union Stock Yards in Chicago, Illinois.

A rehearing of the case is respectfully requested for the following reasons:

I. The Court, in its opinion, states that the District Court was without jurisdiction, assigning two grounds. The

first is that the case is not one "brought to enjoin, set aside, annul or suspend; in whole or in part, any order of the Interstate Commerce Commission". The case of *Acker, et al.* v. *United States of America, et al.*, No. 655, decided on even date, was one brought to enjoin, set aside, annul and suspend the rate orders of the Secretary of Agriculture made upon January 8, 1934, and March 12, 1934, and to make effective the rate which preceded it. The instant case was brought to enjoin, set aside, annul and suspend the same rate orders, and to make effective a rate established by the market agencies in accordance with procedure provided by the Packers and Stockyards Act. In the former, the District Court's jurisdiction is unchallenged. In both cases the attack is upon the same orders. Neither one is an attack upon a negative order. The bill of complaint in the instant case sets up the orders of January 8, 1934, and of March 12, 1934. Of course, the Secretary's refusal to act is not an order. The prayer is broad. Its narrower parts cannot destroy the effect of the prayer for general relief. The prayer to enjoin the Secretary and others from proceeding under the Secretary's orders of January 8, 1934, and March 12, 1934, is apposite to the allegations of the bill of complaint respecting said orders. That the relief would confirm the effectiveness of the rate schedule posted by Appellees on October 19, 1934, no more argues that the instant case was not one to enjoin, set aside, annul or suspend the Secretary's orders of January 8, 1934, and March 12, 1934, than would the fact that an earlier rate order would have been made effective in the Acker case had the Secretary's orders of January 8, 1934, and March 12, 1934, been enjoined, set aside, annulled or suspended in the said *Acker* case.

II. The second ground for lack of jurisdiction, as stated in the opinion, is found in the interpretation placed upon certain sections of the Packers and Stockyards Act. Of

course, as the opinion in its latter part points out, a rate ordered by the Secretary may be enjoined in any appropriate judicial proceeding, or may be altered by subsequent order of the Secretary. This court has frequently pointed out that a rate order valid at one time and not confiscatory, may at a later time, under different facts, become invalid and confiscatory. When such situation arises, at least two different remedies may be pursued. One may be through inducing action on the part of the Secretary, or the Secretary may act on his own initiative. Another is a proper judicial proceeding to enjoin the rate which has become invalid or confiscatory. Where the Secretary has fixed a rate, the rate, as the statute provides, is to be thereafter observed. The order as to what regulation or practice is or will be just, reasonable and non-discriminatory, is to be thereafter followed. The "thereafter" in neither of the foregoing phrases cannot mean forever, if the Secretary does not act. It plainly means until the Secretary acts, or some proper proceeding is taken to effect a change. We take it that the opinion in stating—

> "But when the Secretary, pursuant to Section 310, orders specified rates thereafter to be charged, these become the only lawful rates and so remain until the further order of the Secretary"

suggests no impingement on the power of a proper court at a later time, under proper facts, to enjoin rates once valid if they become invalid or confiscatory.

Congress, in the enactment of the Packers and Stockyards Act, did nothing to limit this power of courts. On the contrary, it is specifically recognized in Section 314. Packers and Stockyards Act provided another method for changing rates to meet changing circumstances. It specifically placed a power in the market agencies so to do, and set up the machinery therefor, with a veto power in the Secretary to be exercised after hearing. If this be not so, then many of the provisions of the Act relating to the filing of

rate schedules can be effective only once and then, after the Secretary has entered a rate order, are without vitality forever. For instance, Section 306 provides for the filing of schedules by a market agency within sixty days after the Secretary has given public notice that a stockyard is within the definition of Section 302. May the market agencies in a business, subject to quick and wide variations, never act again in an endeavor to raise rates save through inducing action on the part of the Secretary, which may be difficult—or by negative action in a court?

Paragraph (c) of Section 306 indicates that changes initiated by the market agencies from time to time are contemplated in saying—

> "No changes shall be made in the rates or charges so filed and published, except after ten days' notice to the Secretary."

That changes by the market agencies were contemplated is further shown in the requirement in the same paragraph that the notice to the Secretary

> "shall plainly state the changes proposed to be made and the time such changes will go into effect."

It provides that these changes so initiated by a market agency may by the Secretary, for good cause shown, be made on less than ten days' notice, and that the Secretary may modify the requirements of Section 306 in regard to publishing, posting and the filing of the schedules.

Paragraph (d), relating to these schedules, gives one cause for which the Secretary may refuse to receive them. That is, that they do not provide for and give lawful notice of the effective date.

That it is contemplated that market agencies may file schedules with veto power in the Secretary is also shown by paragraph (e), in the language

> "*Whenever* there is filed with the Secretary any schedule stating a *new rate or charge*; or a *new regulation or practice* affecting any rate or charge, the Secre-

> tary may, either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing * * *."

Then follow the provisions limiting the suspension to thirty days, and if at the end of sixty days the full hearing provided for is not completed, and veto action is not taken, the proposed change of rate, charge, regulation or practice shall go into effect. The Secretary's refusal to act in the instant case brought the result which the statute contemplated. It, of course, does not limit the Secretary's power to take action at any time after hearing instituted on his own motion.

In Section 309 provisions are made for the disposition of complaints made by any person respecting violations of provisions of Sections 305, 306, 307 and 308, or of any order of the Secretary made under Sections 301 to 317. Among these is Section 306, which imposes the common law duty upon the market agencies to make just, reasonable and non-discriminatory charges. It can be said, in pursuance of the philosophy of the Arizona Grocery case, that no charges can be held discriminatory, unjust or unreasonable if they are downward revisions of a Secretary's order. The point is, however, that this Section also contemplates that schedules may be established without that protection.

In Section 310, paragraph (a), the provision that the Secretary

> "May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case * * *",

and the provisions of paragraph (b) following, are not indicated in any part of the Act to give such orders perpetuity at the Secretary's will. Had it been intended to make nugatory other provisions of Section 306, after the initial action of the market agency on proposing schedules of rates

at a stockyards inception, Congress would have said so. Indeed, if any construction be given Section 306 other than the foregoing, then following the Secretary's entry of the order as to rates at the Chicago Union Stockyards made after the arbitration of 1923, as set forth in the bill of complaint (Rec. p. 4), all of its provisions have since been without vitality.

The provision of paragraph (c) of Section 309, to the effect that the Secretary may institute an inquiry on his own motion in any case, and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, includes Section 306 by its recital that it relates to

"any provisions of this title."

Thus, both by specific language in the Act and by matters implicit therein, it seems clear that the procedure for changing a rate which may be initiated by the market agencies themselves was not limited to one initial act upon the genesis of a stockyards, nor was the Secretary's power to initiate, or any court's power to negative, made exclusive.

We are aware of nothing in the foregoing views that is contrary to the holdings of *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe Railway Co., et al.*, 284 U. S. 370. That case held that the Interstate Commerce Commission may not, through repeal of a rate order, make its effect retroactive. It did not hold that the public utility may not initiate rates or that the exclusive power to undertake changes is resident in the Commission, with a negative power in the Courts.

In the instant case, petition to remedy an intolerable condition was made to the Secretary. The new schedule presented to him for filing was itself a further petition. Also it was a means provided by the Packers and Stockyards Act to secure a hearing. The statute placed a duty

on the Secretary to act or to permit the schedule to stand through refraining from action. The procedure followed was an authorized one, and by analogy in nowise inconsistent with that authorized and followed under the Interstate Commerce Act. The Secretary stood upon his previous orders and threatened to enforce them. The suit attacked those orders and showed that they had been superseded in accordance with the procedure provided by the Packers and Stockyards Act.

For the reasons stated, it is requested that a rehearing be granted.

Respectfully submitted,

GEORGE I. HAIGHT,
Counsel for Petitioners.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

GEORGE I. HAIGHT.

OPINION

SUPREME COURT OF THE UNITED STATES.

No. 656.—October Term, 1935.

United States of America, et al., Appellants, *vs.* J. M. Corrick, et al.	Appeal from the District Court of the United States for the Northern District of Illinois.

[May 18, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

This is an appeal from a decree of a specially constituted district court awarding an interlocutory injunction against the Secretary of Agriculture and others restraining them from prosecuting the appellees, operators of market agencies at the Chicago stockyards, for violation of the Packers and Stockyards Act, 1921.[1]

The appellees are, for the most part, the same persons and corporations as the appellants in No. 655 (*ante* p.). While that case was pending on appeal to this court, and the rates therein prescribed by order of the Secretary of Agriculture were suspended until final determination respecting their validity, the appellees prepared and posted, on October 19, 1935, a schedule of rates for market services at the Chicago stockyards to become effective November 1, 1935. These rates were, in most instances, higher than those prescribed by the Secretary's orders of January 8 and March 12, 1934. On the same day the appellees tendered the schedule to the Secretary for filing. He declined to receive it, assigning as reasons for his refusal that once rates are fixed by him no change therein may be made except by his order or by action of a court of competent jurisdiction and that litigation was then pending challenging the validity of his outstanding orders. Thereupon the appellees filed their bill in the district court reciting the course of the Secretary's proceedings referred to in No. 655, the orders made, and the suit to restrain their enforcement. The pleading asserts that the orders were based on data for the years 1931 and 1932; that, subsequent to promulgation of the orders, conditions had so changed that to prevent destruction of their business the appellees were compelled to adopt a new schedule of charges; it recites the

[1] 42 Stat. 159; U. S. C. Tit. 7, Chap. 9.

Secretary's refusal to file the new schedule and alleges that the refusal was a violation of his duty under the act; it charges that his refusal was of no effect since his only power in the premises was to file the schedule and, if he believed the rates named therein unjust, unreasonable, or discriminatory, to suspend them, pursuant to the provisions of the act, and, after hearing, fix reasonable and nondiscriminatory rates. The bill alleges that the schedule of October 19, 1935, became effective November 1, 1935, and that if appellees failed to conform thereto they would incur heavy penalties while, on the other hand, the Secretary was threatening to prosecute them unless they adhered to the rates prescribed by his orders of January 8 and March 12, 1934. After a hearing upon the bill and a supporting affidavit the court granted an injunction.

On appeal from the granting or refusal of an interlocutory injunction our inquiry is limited to the question whether the court abused its discretion.[2] The appellants urge that the action taken constituted such an abuse for the reason that want of jurisdiction is evident upon the face of the bill. With this contention we agree.

Section 316 of the Packers and Stockyards Act[3] adopts the same procedure for restraining enforcement of or setting aside orders of the Secretary as is provided by law with respect to orders of the Interstate Commerce Commission. By Section 1 of the Commerce Court Act[4] jurisdiction was conferred upon the Commerce Court "over all cases . . . brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913,[5] transferred the jurisdiction of the Commerce Court to the district courts and provided that such cases should be heard by three judges. The words of the statute exclude a mere refusal to act from the section conferring jurisdiction, and this court has accordingly held that an order negative in form and substance is not within the relief ac-

[2] *Farrington* v. *Tokushige*, 273 U. S. 284, 290; *United Gas Co.* v. *Pub. Serv. Com.*, 278 U. S. 322, 326; *Alabama* v. *United States*, 279 U. S. 229, 230; *National Fire Ins. Co.* v. *Thompson*, 281 U. S. 331, 338.

[3] 42 Stat. 168. U. S. C. Tit. 7, Sec. 217: " . . . the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title."

[4] c. 309, 36 Stat. 539.

[5] c. 32, 38 Stat. 208, 219; U. S. C., Tit. 28, §§ 41 (8) 27 (28), 47.

corded.[6] It is clear that the instant bill was not one to set aside or suspend any order of the Secretary. The proceeding brought for that purpose was No. 655, just decided. This suit is to restrain the Secretary and others from instituting prosecution for violations of an order. Its ultimate purpose is to secure a decree affirming the validity and effectiveness of the rate schedule posted by the appellees October 19, 1934. The injunction restrains the defendants from preventing, or attempting to prevent, or from interfering with the appellees in the collection of the rates of charge fixed by the schedule tendered to the Secretary October 19, 1935.

The district court was without jurisdiction for a further reason. Section 306 of the Packers and Stockyards Act[7] directs that within sixty days after the Secretary shall have given notice that a stockyard falls within the definition of Section 302 every market agency at such stockyard shall file with him, and keep open for inspection, schedules of rates and charges for its services. No changes are to be made in the rates so filed and published except after ten days' notice to the Secretary and to the public. Section 310 authorizes an order for investigation and a hearing by the Secretary on complaint, or on his own initiative, as to whether existing rates are unjust, unreasonable, or discriminatory, and empowers him, after such hearing, to "determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, *to be thereafter observed* in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory *to be thereafter followed;* . . . ".[8] Section 306 prescribes the method of initiating rates upon the act's becoming effective, and of voluntary alteration of them from time time. But when the Secretary, pursuant to Section 310, orders specified rates thereafter to be charged these become the only lawful rates and so remain until the further order of the Secretary.[9]

The bill shows that the Secretary, after inquiry and full hearing, fixed rates thereafter to be charged by the appellees, and these had not been set aside or enjoined in any appropriate judicial proceed-

[6] *Procter & Gamble* v. *United States*, 225 U. S. 282, 292; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 412; *United States* v. *Illinois Central R. R. Co.*, 244 U. S. 82; *United States* v. *Atlanta, B. & C. R. Co.*, 282 U. S. 522; *Standard Oil Co.* v. *United States*, 283 U. S. 235, 238.

[7] c. 64, 42 Stat. 164. U. S. C. Tit. 7, Sec. 207.

[8] c. 64, 42 Stat. 166. U. S. C. Tit. 7, Sec. 211.

[9] Compare *Arizona Grocery Co.* v. *Atchison, T. & S. Ry. Co.*, 284 U. S. 370, 386, 387.

ing or been altered by subsequent order of the Secretary. The court was, therefore, without power to enjoin the prosecution of the appellees for charging rates other than those established by the Secretary.

The appellants did not raise the question of jurisdiction at the hearing below. But the lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, and the district court should, therefore, have declined *sua sponte*, to proceed in the cause.[10] And if the record discloses that the lower court was without jurisdiction this court will notice the defect, although the parties make no contention concerning it.[11] While the District Court lacked jurisdiction we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit.[12] The decree must, therefore, be reversed and the cause remanded with directions to dismiss the bill.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10] See *Cutler* v. *Rae*, 7 How. 729, 731; *Morris* v. *Gilmer*, 129 U. S. 315, 325; *Minnesota* v. *Northern Securities Co.*, 194 U. S. 48, 62; *Mattingly* v. *Northwestern V. R. R. Co.*, 158 U. S. 53; *443 Cans* v. *United States*, 226 U. S. 172; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

[11] *Perez* v. *Fernandez*, 202 U. S. 80, 100; *Stratton* v. *St. Louis S. W. Ry.*, 282 U. S. 10, 13.

[12] *United States* v. *Huckabee*, 16 Wall. 414, 435; *Stickney* v. *Wilt*, 23 Wall. 150, 163; *Gully* v. *Interstate Natural Gas Co.*, 292 U. S. 16, 19.